

THE FEDERAL CONSTITUTION AND RACE-BASED ADMISSIONS  
POLICIES IN PUBLIC CHARTER SCHOOLS

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The primary questions addressed in this dissertation are whether race-based admissions policies in charter schools are constitutionally permissible, and if not, how could an admissions policy be designed so that it would promote school diversity without violating the law? These questions are important because there are significant numbers of philosophers and scholars who hypothesize that student body diversity not only enhances educational outcomes but also is a necessary component of civic education in a liberal democracy. The researcher takes no particular stance on the benefits of educational diversity, focusing instead on the constitutional questions raised by the use of race-sensitive policies in the interest of diversity.

The primary methodology used throughout is legal research, though the literature review includes references to political philosophers and social scientists as well as primary legal sources. Chapter I outlines the most frequent arguments made in favor of school diversity and suggests that the judicial philosophy expressed by the Supreme Court over the last twenty-five years has moved away from the philosophy expressed in *Brown v. Board*. In Chapter II, Supreme Court precedent on affirmative action policies is analyzed, focusing mainly on the decision of the divided Court in *University of California Board of Regents v. Bakke*. Chapter III provides a detailed analysis of how six different Federal Circuit Courts interpreted *Bakke*, highlighting numerous recurring judicial themes and concerns. In Chapter IV, existing charter school laws are examined state by state. Chapter V suggests several policy options for those interested in promoting a diverse charter school student body.

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## TABLE OF CONTENTS

	Page
LIST OF FIGURES AND TABLES .....	vi
INTRODUCTION.....	1
CHAPTER I: THE ISSUE OF DIVERSITY IN PUBLIC SCHOOLS.....	4
A. Why Do Some Consider School Diversity to Be Beneficial?	
1. Teaching Toleration	
2. Positive Peer Influences	
3. Equality of Opportunity	
B. School Diversity – A Political and Legal Perspective	
1. The Current State of Integration and Political Involvement	
2. Early Judicial Involvement	
3. Judicial Reluctance to Impose Remedies	
4. Title VI and Disparate Impact	
C. Chapter Summary	
CHAPTER II: THE SUPREME COURT AND AFFIRMATIVE ACTION.....	29
A. <i>University of California Regents v. Bakke</i>	
1. Justice Powell’s “Lonely” Opinion	
2. The “Brennan Block”	
3. Separate Concurrences of Justices White, Marshall, and Blackmun	
4. The “Stevens Block”	
B. The Supreme Court in Non-Educational Settings	
1. <i>Wygant v. Jackson Board of Education</i>	
2. <i>Richmond v. J.A. Croson</i>	
3. <i>Adarand v. Peña</i>	
C. Today’s Supreme Court and <i>Bakke</i>	
D. Chapter Summary	
CHAPTER III: INTERPRETING SUPREME COURT PRECEDENT IN THE FEDERAL CIRCUITS .....	59
A. Key Federal Circuit Cases	
1. <i>Hopwood v. Texas</i>	
2. <i>Johnson v. Board of Regents</i>	

- 3. Race-Sensitive Admissions in Public Schools
  - a. *Wessman v. Gittens*
  - b. *Tuttle v. Arlington County*
- 4. *Hunter v. Regents*
- 5. Race-Sensitive Transfers in Public Schools
  - a. *Eisenberg v. Montgomery*
  - b. *Brewer v. West Irondequoit Central School District*
- 6. Summary of Circuit Court Holdings
- B. Judicial Themes and Concerns
  - 1. The Standard of Review
    - a. What Constitutes a Compelling State Purpose?
    - b. What is Narrow Tailoring?
  - 2. Higher Education v. Public Education: Academic Freedom and Value Inculcation
  - 3. The Role of Social Science
- C. Chapter Summary

#### CHAPTER IV: EXISTING CHARTER SCHOOL POLICIES AND DIVERSITY ..... 114

- A. What is a Charter School?
- B. Court-Ordered Compliance
- C. Process-Oriented Legislation
- D. Results-Oriented Legislation
- E. Pursuing Diversity in Connecticut: *Sheff v. O'Neill*
- F. Charter Laws Without Diversity Provisions
- G. The Legal Dangers of the Laissaz-Faire Approach to Charter School Diversity: The Pueblo Schools
- H. Chapter Summary

#### CHAPTER V: LEGALLY PERMISSIBLE POLICY OPTIONS ..... 142

- A. The State Level
- B. The Campus Level
  - 1. Race-Neutral Alternatives
    - a. The Applicant Pool
    - b. The Admissions Process
  - 2. Narrowly Tailored Alternatives
- C. Chapter Summary

## LIST OF FIGURES AND TABLES

	Page
Figure 1: Relationship of Race and Economics in School Populations .....	11
Table 1: The Supreme Court from <i>Bakke</i> to 2002 .....	56
Figure 2: The <i>Bakke</i> Split .....	57
Table 2: Circuit Court Holdings.....	74
Table 3: Summary of Racial Balancing Provisions in Charter School Laws .....	139
Table 4: Summary of State Charter Laws.....	140-141
Table 5: Sample Diversity Provision in State Charter Law.....	146
Table 6: Sample Charter School Statement on Applicant Pool Diversity.....	149
Table 7: Sample Race-Neutral Charter School Admissions Policies.....	153
Table 8: Sample Race-Sensitive Admissions Policies .....	160

## INTRODUCTION

The struggle to integrate public schools has not been as successful as many had hoped in the aftermath of *Brown v. Board of Education*. Almost fifty years after this historic decision, decreasing judicial support for desegregation remedies in conjunction with pronounced residential sorting have contributed to a public school system that is significantly segregated along ethnic and economic lines. This situation has led some policy analysts to consider the question of how schools may foster diversity among their student bodies without running afoul of the federal constitution. There has been much controversy regarding the idea of affirmative action in higher education. With the number of thematic public schools such as magnet and charter schools increasing, the controversy over selective admissions policies has crept into the public school sector as well. Whether in higher education or public education, the legality of such measures remains in question. This dissertation proposes to address the questions of whether a race-based charter school admissions policy is constitutionally permissible, and if not, how could an admissions policy be designed so that it would enhance student body diversity without violating the law?

Chapter I will examine literature with regard to school diversity and discuss why some educational policy analysts and political philosophers view it as a desirable public policy goal. Chapter I will also cover the legal history of school desegregation and the current state of racial and economic integration in the public schools. It is with this



background that the primary research question will be addressed: Are race-based charter school admissions policies constitutionally permissible? The research will be in four phases. Chapter II will be a comprehensive study of United States Supreme Court precedent regarding affirmative action in higher education admissions and the employment sector. Chapter III will be an analysis of key rulings from the United States Courts of Appeals in various circuits and a discussion of recurring judicial themes and concerns that emerge as these appellate courts attempt to interpret Supreme Court precedent. Chapter IV will examine existing charter school laws in all fifty states with regard to racial balancing provisions in light of the judicial themes and concerns uncovered in Chapter III. Chapter V will discuss charter school admissions policy options that address the concern for student diversity while remaining within the legal boundaries discussed in the previous chapters. It is during this fourth phase that the significance and purpose of this research will come into focus. Chapter V will be enlightening to educational policy analysts and designers who might wish to design a charter school admissions policy that protects the rights of individuals along with the racial, ethnic, and socio-economic integrity of the school.

It must be stated that the research in this dissertation is not based upon any assumptions regarding the desirability of racially-diverse student bodies. It is, however, couched in the understanding that there are certain educators and policy analysts who believe student body diversity in public schools is a necessary ingredient of civic education in a democratic society. The lessons learned from this research could aid scholars in their struggle to provide American students with what they view as a

meaningfully diverse education. This dissertation, therefore, is not an endorsement of affirmative action; it is merely a guide for those who seek to promote student body diversity through admissions policies so that they might better understand the constitutional implications of their actions.

## CHAPTER I

### THE ISSUE OF DIVERSITY IN PUBLIC SCHOOLS

The purpose of this chapter is to provide a contextual backdrop to the legal research by examining the legal and social background of race in public schools. It will review important case law in order to highlight certain judicial trends moving away from active involvement in the enforcement of desegregation remedies. A firm understanding of this legal background is necessary for the later study of affirmative action and related case law. In addition to the case law on this subject, this chapter will include a brief review of the literature related to the concept of diversity in public schools as a valued component of civic education. This review of literature is not intended to set forth unequivocal proof of the proposition that student body diversity is beneficial to the educational process; rather, it is intended to provide a richer background on why some people feel so strongly that certain educational benefits flow from diversity within a learning community. Without at least an appreciation of this particular point-of-view, any further consideration of the constitutionality of race-sensitive admissions policies seems pointless.

#### A. Why Do Some Consider School Diversity to Be Beneficial?

While diversity in schools is a characteristic that most people would put on any short list of favorable institutional traits, not all policy analysts assume the value of its inclusion. In a society that encourages freedom, why would some view racial diversity in

school to be a “good” that should be encouraged through public policy incentives and deterrents? Is it possible that schools would produce better citizens, even better human beings, if parents had the power to segregate their children by race? Before discussing the constitutional dimensions of race-based admissions policies in charter schools, one must first address why some legal, political, and educational scholars view diversity in schools as a desirable end.

### 1. Teaching Toleration

The integration of American schools is usually supported by three main arguments. The first is that racial integration in school is a prerequisite for teaching toleration and mutual respect, two ingredients necessary for citizenship in a liberal democracy. Comprehensive liberals like Amy Gutmann believe that, along with teaching toleration and mutual respect, schools should also foster individuality and autonomy. Political liberals such as John Rawls avoid endorsing any conception of an autonomous life as the “good life,” but still view mutual respect and a sense of fairness as skills essential to good democratic citizenship that must be imparted through civic education. Though they may differ in their reasoning, both comprehensive and political liberal philosophers view civic education as a vehicle for encouraging social diversity in a democracy. According to Gutmann, “Schools cannot teach mutual respect without exposing children to different ways of life...Mutual respect among citizens regardless of their race, religion, ethnicity, or gender is a fundamental prerequisite for a just liberal order. Without mutual respect, members of different groups are likely to discriminate

against each other in many subtle and not-so-subtle ways that are inconsistent with liberal principles.”<sup>1</sup>

Many parents are frightened by the idea of exposing their children to a diverse environment because it might interfere with their ability to pass on their own “superior” way of life. Parents cannot physically expose their children to *every* facet of American culture, and some argue that the state should not require them to do so. But by sheltering children from the “dangers” of diversity, Gutmann suggests, parents are contributing to the destabilization of the liberal society. Ignorance of the reality of American culture as a whole does not fully prepare their child for good citizenship or autonomous living.<sup>2</sup> In a sense, the child is not allowed to base his or her social and political decisions on a variety of experiences with reality; instead, he or she is left to choose only from the experiences provided as a result of the decisions of parents. Not only do children learn to tolerate others in a racially-diverse school, but they also learn to eat, work, play, and live with one another. The suggestion is that there is a certain amount of social growth that is associated with educating children in a diverse environment.

## 2. Positive Peer Influences

A second argument in favor of school diversity involves the effects of positive peer groups upon student achievement. In the 1998 book, *The Shape of the River*, Bowen and Bok analyze the effects of peer groups in higher education, suggesting that they are significant enough to justify race-based admissions criteria. In their study, Bowen and Bok found that, when compared with students of similar abilities, students tended to have greater success on numerous measures when they attended highly selective colleges. The

indication is that a student surrounded by high-achieving peers tends to achieve higher himself than he would if surrounded by lower-achieving peers. In a study conducted in the late 1970s, it was found that students of “various abilities and achievement levels benefit from being in classes where the mean achievement is higher.” Therefore, “if the objective of society is to maximize the overall achievement level of its students, a uniform mixing of students by achievement will be optimal.”<sup>3</sup>

It would seem that parents know instinctively about the importance of peer culture and influence. When parents talk about wanting to live in areas with “good public schools,” they are not necessarily talking about schools with the greatest per pupil expenditures. Educational scholars such as Richard Kahlenberg suggest that what parents really mean is that they want their children to attend schools filled with predominately middle-class children. “Given a choice between a high-poverty school that spends more per pupil and a middle-class school that spends somewhat less, most parents would not have a hard time deciding on the middle-class school.”<sup>4</sup> There is a body of research suggesting that such a parental bias may, in fact, be justified. In a 1998 study, David Rusk compared student performance on the Texas Assessment of Academic Skills (a standardized state achievement test) and found that students from a wealthy San Antonio area district performed considerably better than students from a high poverty San Antonio area district, despite the fact that the per-pupil expenditures were higher in the high-poverty district. Some scholars even suggest that *de facto* economic segregation may be more harmful than *de facto* racial segregation.<sup>5</sup> “Being born into a poor family places students at-risk, but then to be assigned to a school with high concentrations of poverty

poses a second, independent disadvantage that poor children attending middle-class schools do not face,” Kahlenberg noted in an article appearing in the December 2000 edition of *The Washington Monthly*. “Taken together, being poor and attending schools with classmates who are poor, constitutes a clear ‘double handicap.’”<sup>6</sup>

A recent study by the *Washington Post* of the schools in Montgomery County, Maryland exposed an alarming gap in achievement between middle class schools and schools with high concentrations of poverty, despite the fact that the county’s high poverty schools were “renovated and chock-full of books and state of the art computers” and “have long been given more resources – as much as \$3,000 more per pupil, in some cases, than other county schools.”<sup>7</sup> According to the study, lower income students performed most poorly when they were in schools that were overwhelmingly poor. When lower income students attended schools where most of their classmates were affluent, they performed better, in many cases at or above the county average. Finally, the study reported that, even when they attended schools with heavy concentrations of economically-disadvantaged students, middle class students still tended to perform reasonably well on standardized measures.

The achievement gap in Montgomery County is a challenge being faced by numerous school systems throughout the country. This phenomenon has prompted school officials from San Francisco to Maryland to consider policy options that will help break up the patterns of economic segregation caused by residential sorting. School administrators in Wake County, Maryland have considered the problem serious enough to implement a school transfer policy that takes into consideration student economics and

performance. The plan is designed to ensure that no Wake County School is overburdened with economically disadvantaged or poor performing students.<sup>8</sup>

If peers can have such a tremendous positive impact on low income students, what is to ensure that middle class students will not suffer a negative influence if mixed with low income peers? An answer to this concern may be found in the well-known “Coleman Report” of 1966. According to “Coleman’s Law,” the peer culture of a school has a much greater influence on economically-disadvantaged students than it does wealthy or middle class students. Coleman’s theory was that poor students tended to be from less structured, often single parent, family environments and were more open to the influence of their peers. If the dominant peer culture is one that is generally negative with regard to education, economically-disadvantaged students, who may have less interaction with adults and lower educational expectations at home, are likely to adopt attitudes that are not conducive to the educational experience. In contrast, a middle class student with strong family structure and high parental expectations is less likely to conform to the dominant peer culture of the school.

Positive peer socialization theories may be more related to economics than race, but they are still useful in defending the concept of racial integration. To no one’s surprise, research has shown that there is a significant statistical correlation between race and economic status. In a study of over one hundred individual public school campuses across three suburban Dallas area districts, there was an almost perfect statistical correlation between the racial and socio-economic composition of the schools. If a school was largely white, then the percentage of economically-disadvantaged was very

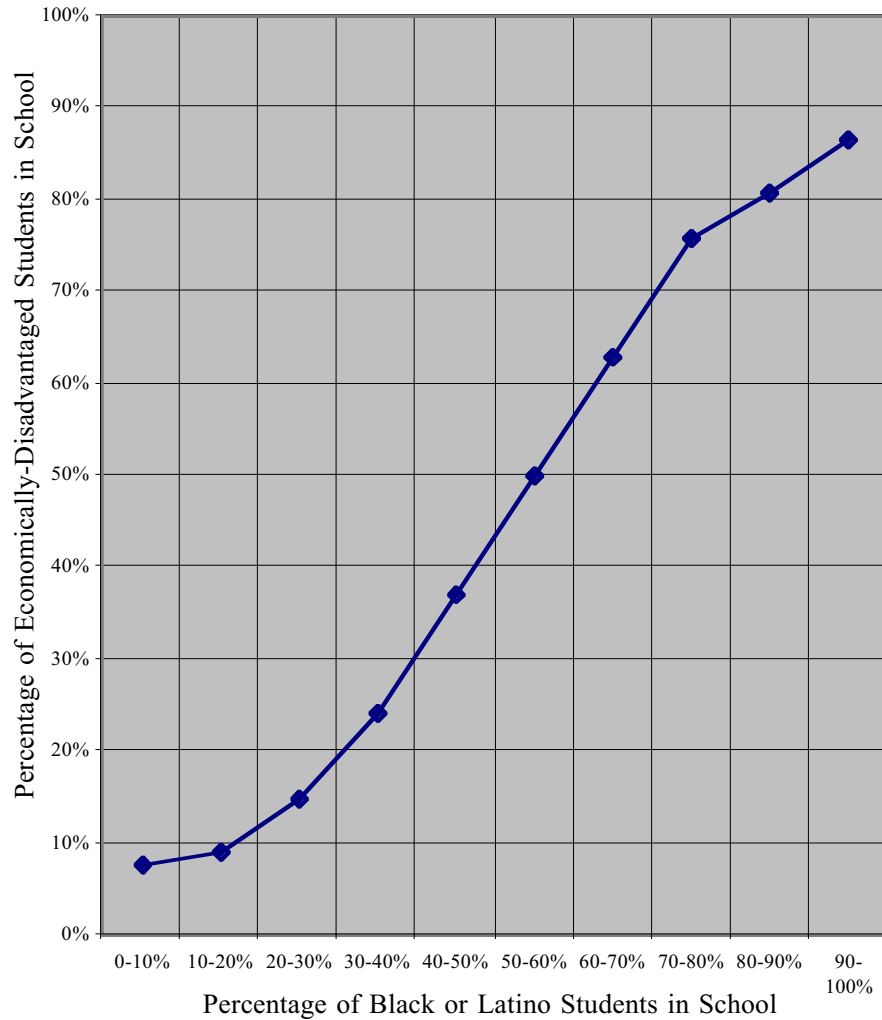


low. If the school was predominately minority, then the percentage of economically-disadvantaged students was extremely high.<sup>9</sup>

Gary Orfield and John Yun have also established a strong statistical link between race and economic status, finding that, in schools that are ninety percent or greater in African-American or Latino student population, eighty percent of the students live in poverty. In contrast, only eight percent of American public schools with minority populations of less than ten percent had a majority of its students living in poverty. Students in schools that are predominately minority are eleven times more likely to live in poverty than students in largely white schools. “This relationship,” suggest Orfield and Yun, “is absolutely central to explaining different educational experiences and outcomes of the schools. A great many of the educational characteristics of schools attributed to race are actually related to poverty.”<sup>10</sup> Figure 1 is based on Orfield and Yun’s data and clearly indicates the positive relationship between the racial/ethnic composition and socio-economic composition of public schools.

As an example of how economic integration can pay educational dividends, one may examine the case of Logan and Central High Schools in La Crosse, Wisconsin. The town of La Crosse is geographically and culturally divided by a marsh. The south side of the marsh, where Central High is located, largely comprises middle and upper class professional families. The north side of the marsh, where Logan High is located, comprises mostly blue-collar families. Historically, Central had been the college preparatory school and Logan had been the vocational school. Not surprisingly, Central consistently outperformed Logan on standardized academic measures. In the late 1970s,

Figure 1: Relationship of Race and Economics in School Populations



however, attendance boundaries were shifted to lessen overcrowding at Central and to create greater economic balance between the schools. Though the change was extremely difficult to make politically, it was effective in equalizing the two schools in terms of educational output. More importantly, the equalization has not come at the expense of Central High. According to Richard Swantz, who was the superintendent at the time, “Logan came up, Central did not go down.”<sup>11</sup>

### 3. Equality of Opportunity

The third traditional justification given for school integration is the “equality of opportunity” argument. The Fourteenth Amendment of the Federal Constitution states that a state shall not “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Prior to 1954, the prevailing legal doctrine was that, as long as separate facilities were “equal,” there was no violation of the Fourteenth Amendment. With the *Brown v. Board of Education* decision, however, separate schools began to be viewed as inherently unequal. Forced segregation based upon race, the Court ruled, damaged minority children in a lasting way.<sup>12</sup>

While legally sanctioned (*de jure*) segregation is a thing of the past, many suggest that the current educational system carries with it remnants of the past in the form of *de facto* segregation. Residential sorting and the unconstitutionality of proposed remedial measures have combined to create a school system that is economically segregated by choice and racially segregated by result. Many parents, educators, and legal scholars fear that the cherished value of “equality of opportunity” will never be realized in this environment. If schools are not given an incentive to educate economically-disadvantaged and minority students alongside those who are upper-middle class and white, many believe that school segregation will only increase. This argument is at the very core of the legal arguments surrounding school integration and affirmative action that will be the focus of the rest of this chapter.

## B. School Diversity – A Political and Legal Perspective

Just how integrated are public schools today? The short answer is “not very.”

The following sections examine in more detail the current state of and political climate surrounding school integration as well as the major Supreme Court cases dealing with school desegregation.

### 1. The Current State of Integration and Political Involvement

In a 1999 study as part of the Civil Rights Project at Harvard University, Gary Orfield and John Yun identify four major trends in public school demographics: First, the southern states are resegregating at an alarming rate, ostensibly as a result of the lessening of the judicial pressures that for a quarter of a century had made that region's schools the most integrated in the nation. Second, Latino students are suffering increased levels of segregation and, for a number of years, have been even more racially isolated than African-American students. This is of particular concern because Latino students are quickly becoming the largest minority group in the country. In fact, in California and New Mexico, Latino students outnumber any other ethnic group in the public schools. Third, there are increasing numbers of African-American and Latino students in suburban schools, coupled with acute racial and economic segregation in the nation's largest suburban areas. Fourth, American schools are continuing to change rapidly in racial composition. Schools with three or more racial groups represented are becoming more common, and many students find themselves in schools with considerable diversity, although the level of meaningful interaction between students of different ethnic groups is open to debate. The nation's white students, however, are very likely to attend schools

that are overwhelmingly white, even when geographically situated in largely non-white areas.

Orfield and Yun cite a lack of governmental interest and involvement as a major contributor to the current state of disintegration in American schools: “We are clearly in a period when many policymakers, courts, and opinion makers assume that desegregation is no longer necessary, or that it will be accomplished somehow without need of any deliberate plan.”<sup>13</sup> Former Presidents Kennedy and Johnson both supported the enactment and enforcement of major civil rights legislation. Former President Nixon, though ardently opposed to busing, initiated a federal aid program aimed at improving interracial schools in America in 1972. Former President Carter subsequently fought to increase funding to Nixon’s desegregation aid program so research could be expanded. Former President Reagan eliminated the Nixon program during his administration, and neither President Bush nor Clinton reinstated it during their terms. Orfield and Yun summarize the political backdrop of their findings by stating that “the law now is much closer to Reagan’s vision than to that of the Warren and Burger Courts. Mandatory desegregation orders are being dissolved on a large scale and voluntary ones are being challenged in many courts.”<sup>14</sup>

## 2. Early Judicial Involvement

The lack of meaningful integration in American schools might be surprising to some. After all, it has been almost fifty years since the United States Supreme Court ruled in *Brown v. Board of Education* that separate schools were inherently unequal. That landmark decision in 1954 was not the end of the battle, however, it was just the

beginning of a new phase. The struggle for the desegregation of America's public schools has continued for many years and through much litigation. In the aftermath of the *Brown* decision, many states and districts were reluctant to comply and employed tactics to stall, and in some cases circumvent, the ruling of the Court. In light of this reluctance, continued judicial involvement in school desegregation issues was inevitable. Though there were internal tensions within the Supreme Court of the 1960s, the Court's decisions from that era generally reflected a more aggressive philosophy with regard to the enforcement of the mandates of the *Brown* decision than the Court's decisions over the last quarter of a century have shown.

In 1968, the Court ruled that a freedom-of-choice system enacted by a rural school district in Virginia was not an adequate means of achieving an integrated system. Justice William Brennan's opinion in *Green v. County School Board* was guided by the philosophy that all vestiges of segregation be eliminated "root and branch." While the district claimed that the choice policy was put in place to foster integration of the schools, the majority viewed it as an ineffective and half-hearted attempt to comply with the *Brown* mandate.<sup>15</sup> Justice Brennan noted that the district had other, more effective alternatives available. A key element in Brennan's opinion that would resurface in subsequent cases is the identification of the six areas of school district operation from which segregation and its vestiges must be eliminated: student assignments, transportation, physical facilities, extracurricular activities, faculty assignments and resource allocation.

In 1971, the Court again showed its willingness to enforce the *Brown* mandate when it unanimously approved a desegregation plan in *Swann v. Charlotte-Mecklenburg Board of Education* that included such sweeping remedies as the use of quotas, busing, and the altering of attendance zones. As Chief Justice Burger explained, “School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.”<sup>16</sup> Though this decision gave school districts several powerful tools to be used in their efforts to integrate schools, these tools proved to be controversial. The political unpopularity of busing and quotas may have helped fuel a backlash that contributed to the election of a new President and subsequent appointments of new Supreme Court justices. Future decisions would begin to retreat from the judicial philosophy expressed in *Green* and *Swann*. The first example of this judicial retreat occurred in 1974 with *Milliken v. Bradley*.<sup>17</sup>

### 3. Judicial Reluctance to Impose Remedies

*Milliken v. Bradley* was the outgrowth of a class-action lawsuit filed by the Detroit chapter of the National Association for the Advancement of Colored People against the Governor, Attorney General and State Board of Education in Michigan. Additionally, all local school boards and superintendents were named as defendants in the original suit. The plaintiff class, which included all school children of the State of

Michigan as well as all Detroit residents with school age children, alleged that Detroit schools were highly segregated as a result of the official actions and policies of the defendants. In September of 1971, the United States District Court for the Eastern District of Michigan ruled in favor of the plaintiffs, stating that “Government actions and inaction at all levels, federal, state and local, have combined, with those private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and maintain the pattern of residential segregation throughout the Detroit metropolitan area.”<sup>18</sup> The district court then turned its attention to the remedy, ordering the Detroit board to design a citywide plan and the state board to design a metropolitan plan. In March of 1972, the district court announced that, of three plans submitted by the Detroit board, even the best was insufficient and would result in the Detroit schools becoming more identifiably African-American.

Having rejected the local plans, the district court embraced the metropolitan plan proposed by the state board, reasoning that it was the only way to remedy the problem. By early April, the court had already held a series of hearings discussing the implementation of such a plan before finally settling on a proposal that would designate fifty-three of the outlying eighty-five districts as “desegregation areas.” A panel was then appointed to create a plan for integration that would include these specified areas. The findings of the district court were upheld upon appeal to the United States Court of Appeals for the Sixth Circuit. This set the stage for the appeal to the United States Supreme Court, where the only remaining point of contention was the scope of the remedy.



The case went before the Supreme Court in February of 1974. In late July, the Supreme Court struck down the remedial plan, holding that school desegregation remedies should not cross the boundaries of individual school districts where there is no evidence of constitutional violations. The five to four decision was issued with the majority opinion authored by Chief Justice Warren Burger, who focused on the following points: First, the district court had misinterpreted Supreme Court precedent in concluding that school districts must reach some sort of racial balance in order to achieve integrated status. Citing *Swann*, Chief Justice Burger argued that the concept of desegregation presupposes no particular ethnic ratios. Second, the district court failed to understand fully the magnitude of disruption that would be caused to these surrounding districts if the plan were to be implemented. Third, there had been no evidence presented in the district court that suggested any of the fifty-three outlying districts included in the desegregation plan had been guilty of any significant actions that had resulted in the increase of segregation, either in their own district or any other surrounding districts.

Though the majority struck down the multi-district remedy, it is worth noting that Justice Potter Stewart, in his concurring opinion, left the door slightly open to the possibility that an inter-district remedy of the sort approved by the Court of Appeals might be appropriate or “even necessary, in other factual situations.”<sup>19</sup> In his dissenting opinion, Justice Douglas suggested that the majority ruling was guided by nineteenth century mentality: “When we rule against the metropolitan area remedy we take a step that will likely put the problems of the blacks and our society back to the period that antedated the ‘separate but equal’ regime of *Plessy v. Ferguson*.”<sup>20</sup> In a separate dissent,

Justice Marshall supported Douglas' suggestion that the decision represented a step backward while also arguing that the decision was legally and philosophically inconsistent with the Court's prior holdings: "Our precedents firmly establish that where, as here, state-imposed segregation has been demonstrated, it becomes the duty of the State to eliminate root and branch all vestiges of discrimination."<sup>21</sup> Justice Marshall's dissent culminated with the stinging accusation that the reasoning of the majority was guided more by politics than sound legal principles.

The significance of the *Milliken* decision cannot be overstated because the circumstances in Detroit at the time were, and still are, typical of many large urban and suburban areas throughout the United States. Many would suggest that *Milliken* established the principle that there can be no remedy for *de facto* segregation. The implications of this decision, however, are much deeper. The district court, circuit court, and Supreme Court all agreed that the geographic segregation in Detroit was the result, at least in part, of government action on both the state and local level. As the dissenters pointed out, the effect of the decision was to create a situation in which the State was, for all practical purposes, powerless to rectify an unconstitutional situation that it had helped to create.

In 1991, the Court attempted to determine at what point a school district has done enough to achieve unitary or fully-integrated status. In *Board of Education of Oklahoma City Public Schools v. Dowell*, the Court awarded unitary status to a district with a long history of racial segregation after approximately twelve years of compliance with a court-ordered desegregation plan.<sup>22</sup> The ruling allowed the district to continue a "student

reassignment plan” that had resulted in a significant increase in the number of racially-segregated schools within the district. Once again Justice Marshall voiced a vigorous dissent, suggesting that his colleagues’ decision sent the signal that “thirteen years of desegregation are enough.”<sup>23</sup>

A year later, the Court decided a case that, like *Milliken*, clearly demonstrated the relationship between housing patterns and school segregation. Between 1970 and 1980 the non-white population in Dekalb County, Georgia underwent tremendous growth. In the southern sector of the county, the non-white population had grown from around 11,000 to almost 90,000. These demographic shifts wrought havoc with the desegregation plan the county school system had enacted in response to the *Green* ruling. In *Freeman v. Pitts*, the Court ruled that the demographic shifts were beyond the control of the district and that their efforts toward equity in the areas of student assignment, extracurricular activities, physical facilities and transportation were sufficient for the district to be declared unitary.<sup>24</sup> An important difference between this case and *Milliken* is that in this case, there was no clear finding in the lower court that any governmental action or inaction had contributed to the housing patterns in the county.

A 1995 Supreme Court opinion, *Missouri v. Jenkins*, dealt with the scope of the federal court’s authority to mandate remedial action. The case originated with a complaint that the State of Missouri, along with surrounding school districts and various federal agencies, had perpetuated a racially-segregated system of schools in and around Kansas City. Eventually, the case was dismissed against the federal agencies and surrounding school districts, leaving the state as the sole defendant. The trial court found

that the State had at one time (prior to 1954) mandated segregated public schools and that neither the State nor the Kansas City Missouri School District had fulfilled its respective obligations to eliminate the vestiges of past discrimination. The first remedial order in this case was issued by the district court in 1985, mandating a number of instructional improvements in the Kansas City schools.

By 1987-88, the school system in Kansas City had improved to the point that it was awarded a “triple A” rating by the State. However, African-American students comprised close to seventy percent of the Kansas City’s school population. Without the sort of inter-district remedy that had been ruled unconstitutional in *Milliken*, racial diversity seemed to be an improbable goal. The approach taken by the district court was to order the implementation of various measures designed to improve the Kansas City schools to the extent that they would attract non-minority students from the suburban districts.

When the case reached the Supreme Court, two questions were under consideration. First, could the district court order the State of Missouri to fund salary increases for almost every single employee of the Kansas City Missouri School District? Second, could the district court order the State of Missouri to continue funding educational improvement programs until such time that students in the Kansas City schools were no longer testing “at or below norms at many grade levels?” The Supreme Court answered both questions negatively. Rather than viewing the district court plan as an attempt to eliminate the vestiges of the illegal discrimination in the Kansas City schools to the greatest extent possible, they criticized it as an attempt to create a magnet

district that would attract students from the surrounding suburban districts. This, in the view of the Court, was tantamount to the type of inter-district remedy they had declared constitutionally off-limits in the *Milliken* case.

Particularly noteworthy in this case is the concurring opinion of Justice Clarence Thomas in which he soundly criticizes the Supreme Court's reliance upon social science evidence in *Brown v. Board of Education*: "It never ceases to amaze me that the courts are so willing to assume that anything that is predominately black must be inferior," Justice Thomas asserted in his opening salvo. "The court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies on questionable social science research rather than constitutional principal, but it also rests on an assumption of black inferiority."<sup>25</sup> Justice Thomas' concurrence in this case seems to be symbolic of a larger shift in judicial reasoning with regard to the importance of school diversity in the realization of equal educational opportunity.

#### 4. Title VI and Disparate Impact

The Fourteenth Amendment protects citizens from intentional racially-discriminatory state action, but what course of action does one have when state conduct has an unintended discriminatory impact on a race of people? As part of the Civil Rights Act of 1964, Title VI bans discrimination on the basis of race, color or national origin by any agency that receives federal funding. Section 602 of the same Title authorizes federal agencies to promulgate regulations to enforce Section 601.<sup>26</sup> In response to Section 602, the Department of Justice issued regulations prohibiting any agency

receiving federal dollars from employing administrative procedures or policies that have the impact of discriminating against individuals based upon race, color, or national origin.<sup>27</sup> The concept that certain administrative policies and procedures might sometimes have an unintended discriminatory impact upon certain groups is known as “disparate impact.”

The Supreme Court decided a landmark case related to Title VI and disparate impact in 1974 when it ruled in *Lau v. Nichols* that San Francisco schools were out of compliance with the law by failing to provide adequate instructional modifications in English to address the needs of almost two-thousand Chinese students who were non-English speakers. Justice Douglas delivered the opinion of the Court in *Lau v. Nichols*, stating that “basic English skills are at the very core of what these public schools teach... We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.” Justice Douglas added that in this particular case “there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum.”<sup>28</sup>

In 1976, the Court again dealt with the issue of disparate impact, but this time in the context of an employment discrimination case. In *Washington v. Davis*, the Court determined that the Police Department of the District of Columbia could continue administering a written test known as “Test 21” to prospective police officers without violating the Equal Protection Clause of the Fifth Amendment. The case involved two rejected African-American applicants who argued not only that the test bore no relationship to job performance but also that a disproportionate number of African-

Americans were disqualified as a result of poor test performance. The use of the test was upheld in the trial court, which found that there was no discriminatory intent on the part of the police department and, therefore, the plaintiffs were not entitled to relief. The United States Court of Appeals for the Fourth Circuit, however, reversed the ruling of the district court based upon Title VII of the Civil Rights Act of 1964, which prohibits pre-employment tests that disparately impact minorities unless the employer can demonstrate a substantial relationship between the test and job performance. The Supreme Court subsequently overturned the ruling of the Fourth Circuit, finding that it was mistaken in its reliance upon Title VII standards to resolve the case. The impact of this ruling is important, for it established that claims of disparate impact under Title VII are not actionable by private parties.

The Supreme Court recently offered further clarification on the subject of disparate impact in *Alexander v. Sandoval*.<sup>29</sup> Though not an education-related case, this ruling of the Court related to the concept of disparate impact has great relevance to this research. The circumstances that gave rise to this case originated in 1990 when the State of Alabama amended its constitution to name English as the official state language. Following the change to the constitution, the Department of Public Safety enacted a policy stipulating that all drivers' license examinations be administered only in English. This provision, they argued, was in the interest of promoting public safety. Plaintiff Sandoval initiated suit in the Federal Court for the Middle District of Alabama, claiming that the Department of Public Safety regulation violated the Department of Justice regulations regarding disparate impact. The district court agreed with Sandoval and

enjoined the department from continued enforcement of the policy.<sup>30</sup> Upon appeal, the Eleventh Circuit upheld the ruling of the district court.<sup>31</sup> The Department of Public Safety argued that, because the complaint was based upon Department of Justice regulations and not statutory laws, a private party such as Sandoval had no cause of action. The Department of Public Safety appealed the circuit court's decision, asking the Supreme Court to review the question of whether private parties could sue to enforce the administrative law related to Section 602 of Title VI.

The Supreme Court ruled that there is no private right of action to enforce disparate impact regulations under Title VI. The Court admitted that there was a certain lack of clarity in its precedent related to Title VI; however, the Court believed the precedent led to three clear conclusions: First, private parties may sue in order to enforce the provisions of Section 601 of Title VI. Second, the provisions of Section 601 prohibit only *intentional* acts of discrimination. Third, for the purposes of this case only, the Court assumed that the regulations promulgated by the Department of Justice under Section 602 are valid.

Justice Scalia, who authored the majority opinion on behalf of Justice Thomas, Justice Kennedy, Justice O'Connor, and Chief Justice Rehnquist, expressed substantial concern regarding the disparate impact regulations in Section 602. Clearly, there was a private right of action under Section 601, but the actions prohibited under the Department of Justice regulations pursuant to Section 602 are not prohibited under Section 601. The Court looked for evidence or language suggesting that Congress intended there to be a private right of action to enforce these regulations under Section 602. Lacking any such



evidence, the majority overturned the holding of the lower courts: “Having sworn off the habit of venturing past Congress’ intent, we will not accept respondents invitation to have one last drink.”<sup>32</sup> The important impact of this holding, of course, is that private parties cannot seek judicial relief under Title VI in a disparate impact case. Such complaints may be dealt with through administrative actions, such as cutting off funding, but in light of this precedent, schools are relatively safe from litigation under Title VI if the alleged discriminatory conduct is non-intentional.

### C. Chapter Summary

While it is not the purpose of this chapter to establish that a diverse student body is educationally preferable to a non-diverse student body, the chapter provides important background as to why some scholars feel that diversity in schools is a worthy goal. Without this background, any further discussion of how to foster educational diversity would be meaningless. This chapter has detailed three of the primary arguments supporting the integration of American schools.

First, contemporary liberal political philosophers such as Amy Gutmann and John Rawls believe that the teaching of mutual respect in public schools is essential for democratic citizenship and diverse schools are necessary to accomplish that goal. Second, social science research indicates that the peer culture of a school can have significant impact upon the educational achievement of some students. There is a body of research indicating that high concentrations of poverty in a school tend to negatively impact student successes, even when per pupil expenditures are high. The research also suggests that there are positive spillovers for students of low socio-economic status who

go to school with more affluent classmates. Importantly, these positive spillovers do not seem to be offset by any corresponding negative impact of low socio-economic students on more affluent students. This research, taken in context with the positive relationship between poverty and minority status, suggests that students will benefit from being in racially-diverse environments. Third, there are those who suggest that school integration is necessary to fully realize the constitutional value of equal opportunity.

Almost a half of a century after *Brown v. Board of Education*, data indicate that public school students in America are very likely to attend schools that are extremely segregated. Throughout the 1950s and 1960s, the Court was supportive of the movement towards integration, taking an aggressive approach to effectuating remedies and seeking to eliminate all the vestiges of prior discrimination root and branch. The early 1970s saw a retreat from the “root and branch” approach to combating segregation toward what might be called a “laissez-faire” approach to desegregation. In Supreme Court decisions such as *Milliken v. Bradley*, *Oklahoma v. Dowell*, *Freeman v. Pitts*, and *Missouri v. Jenkins*, the Court has shown reluctance to impose the sweeping remedies endorsed by Chief Justice Burger in *Swann*.

For these and other reasons, many educational policymakers, political philosophers and legal scholars share a growing concern with regard to diversity in American educational systems. In the interest of promoting meaningful educational diversity, race-sensitive policies related to student admissions or transfers have been discussed and implemented at American colleges, universities, and public schools. The same concern over educational diversity has prompted state lawmakers in almost twenty

states to include diversity provisions in their state charter school laws. It is the constitutionality of these kinds of affirmative action admissions policies that is the focus of this research.

## CHAPTER II

### THE SUPREME COURT AND AFFIRMATIVE ACTION

School choice in its various forms is gaining in popularity throughout the country, and the charter school is one form of choice school that has a strong foothold in most states. Public schools, which traditionally have admitted students based upon geographical attendance zones, have generally not had to worry about crafting admissions policies designed to promote student diversity or prevent racial isolation. Charter schools have open enrollment that is not confined to a narrowly-defined attendance zone. They are also generally small and frequently may have more applicants than they have the space to accept. The unique nature of charter school admissions brings with it the concern that, without proper policy protection, charter schools could exacerbate racial segregation. But what type of policies could be enacted to encourage charter school diversity but remain within the confines of constitutional law?

In *University of California Regents v. Bakke*, the Supreme Court has given their only guidance on the issue of race-based admissions in education.<sup>33</sup> This chapter will provide an analysis of the intricacies of the *Bakke* decision as well as an examination of other Supreme Court precedent dealing with affirmative action policies in other sectors.

#### *A. University of California Regents v. Bakke*

*University of California Regents v. Bakke* was decided by the United States Supreme Court in 1978. The case was the outgrowth of a legal challenge to the special admissions program of the University of California at Davis Medical School. Those who went through the general admissions program were rejected immediately if their

undergraduate GPA was less than 2.5. Of those who met the GPA requirements, about one out of six was invited for an interview before a small committee. The applicants would then be ranked on the basis of their interview performance and other factors, including past overall academic performance, performance in science classes, Medical College Admissions Test (MCAT) scores, letters of recommendation, and biographical data. Minority students seeking admission went through a special admissions program, similar to the general program except that they did not have to meet the 2.5 GPA requirement. A special committee, which was predominately minority, interviewed these students. Each year, sixteen of the 100 openings were reserved for students admitted through the special admissions program. During a four-year period, 107 minority students were admitted to the medical school, sixty-three of whom were admitted as a result of special admissions. Allen Bakke, a white male, applied twice and was twice rejected through the general admissions program. Both rejections came at a time when there were still slots open in the special admissions program. He filed suit in federal court, claiming that the policy violated his Fourteenth Amendment Right to Equal Protection, Title VI of the Civil Rights Act of 1964, and the California Constitution. The Supreme Court ultimately ruled the policy unconstitutional, and the medical school was ordered to admit Bakke. Though the Justices did strike down the University of California policy, the decisive opinion of Justice Lewis Powell created a key piece of legal doctrine: the goal of achieving a diverse student body in a state school is sufficiently compelling to justify the state's use of racial classifications as one factor in an admissions policy. The divided nature of this decision, however, has made for somewhat shaky precedent.

There are two essential components to the Court's decision in *Bakke*; first, that the Davis admissions program was unconstitutional and second, that race can be constitutionally considered in college admissions decisions. The decision was a slim five to four on both counts. The only Justice to be in each majority was Justice Powell. In ruling the admissions program unconstitutional and ordering Bakke's admission, Powell was joined by Justice Paul Stevens, Justice Potter Stewart, Justice William Rehnquist, and Chief Justice Warren Burger. However, in reversing the lower court ruling that race could never legally be considered in admissions decisions, Justice Powell was joined by Justice William Brennan, Justice Byron White, Justice Thurgood Marshall and Justice Harry Blackmun. Though the five Justices agreed upon the fact that race could conceivably be a consideration in admissions decisions, they did so for different reasons.

#### 1. Justice Powell's "Lonely" Opinion

Justice Powell reasoned that racial classifications always require strict judicial scrutiny, which means that the state must demonstrate a compelling purpose and that the policy is narrowly tailored to achieve that purpose. In other words, the policy alternative must be the least restrictive means of accomplishing that compelling purpose. Justice Powell acknowledged, but was ultimately unmoved by the university's proposition that, because the racial discrimination was what they called "benign" in nature, the standard of judicial review should be somewhat less than strict: "Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the

‘majority’ white race against the Negro minority. But they need not be read as depending upon that characterization for their results.” Though Justice Powell was willing to consider the arguments for a race-based policy, the “standard of justification” was not open to debate. Accordingly, any such policy, Justice Powell asserted, must be “precisely tailored to serve a compelling governmental interest.”<sup>34</sup>

The first key question Justice Powell sought to answer in analyzing the Davis policy was what state purpose was supposedly being served by the policy and was that purpose compelling enough to justify a race-based classification? The state clearly has a substantial interest in redressing the vestiges of identified past discrimination. A race-based program for such purposes would seemingly have passed constitutional muster with Justice Powell. The State’s interest in ameliorating the effects of identified past discrimination, however, does not extend to the more abstract concept of remedying the effects of past “societal discrimination,” a construct Justice Powell viewed as “an amorphous concept of injury that may be ageless in its reach into the past.”<sup>35</sup> Justice Powell was succinct in his argument: “Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”<sup>36</sup>

Justice Powell answered another of the university’s arguments by acknowledging that the State may have a compelling purpose in its stated goal of improving medical services to underserved communities, but that there was simply no evidence that the

Davis admissions plan was either designed for or even necessary to achieve that goal. There were no assurances that a minority medical student, even when he or she had expressed an interest in practicing in an underserved community, would actually do so. Though it is logical to assume that minority candidates might be more likely to express such an interest than the average white candidate, the lower court pointed out that there “are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race,” and Powell agreed.<sup>37</sup>

Finally, Justice Powell addressed the university’s proposition that they had an interest in cultivating a diverse student body, which he described as “clearly a constitutionally permissible goal for an institution of higher education.” He linked this purpose with the concept of academic freedom, citing Justice Felix Frankfurter’s opinion from *Sweezy v. New Hampshire* in which he enumerated the four essential components of academic freedom: “Who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>38</sup> Though Justice Powell conceded that the concept of academic freedom is not a constitutionally-enumerated right, he insisted that it “has long been viewed as a special concern of the First Amendment.”<sup>39</sup> Justice Powell cited a passage from *Keyishian v. Board of Regents*: “Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment...the Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues...”<sup>40</sup> Having tied the university’s claim to the concept of academic freedom and, therefore,



hitching it to the First Amendment, Justice Powell unequivocally concluded that the goal of building a diverse student body represents a “countervailing constitutional interest” which is sufficiently compelling to justify race-based classifications in their admissions policy.

Having passed the first prong of Justice Powell’s test of strict scrutiny, the next test for the policy was whether or not it was narrowly tailored to promote that interest. In Justice Powell’s view, the special admissions program at Davis failed that test. He was particularly critical of the program’s focus only on racial and ethnic diversity as well as the dual track nature of the Davis admissions process, which disqualified individuals from participation in the special admissions program based on race or ethnicity. Justice Powell suggested that “The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.”<sup>41</sup> Justice Powell believed that, though diversity was a compelling state goal, there were less restrictive and more effective means of achieving that goal than the plan in question, and therefore ruled it unconstitutional.

## 2. The “Brennan Block”

Justice Powell combined with Justices Brennan, Blackmun, Marshall, and White to form a majority of five holding that race could constitutionally be one of the criteria considered by colleges in making admissions decisions. Implied in that majority decision is the principle that student body diversity is a compelling government interest;

however, Justice Powell is the only one of the Justices on the Court at the time to reach that particular conclusion. Justices Brennan, joined by Justices Marshall, Blackmun, and White, wrote an opinion that concurred in part and dissented in part with Justice Powell. The major split between Justice Brennan and Justice Powell concerned the standard of review.

Strict scrutiny is required in equal protection analysis when the exercise of a fundamental right or the creation of a suspect classification is involved. Clearly, there is no fundamental right to be admitted to the medical school of one's choice. In Powell's view, the classification of prospective students by race or ethnicity clearly constituted a suspect classification. Justices Brennan, Blackmun, Marshall and White (the Brennan Block), however, argued that in order for a class to be suspect, they must have been the victims of past discrimination. Citing the 1938 decision of *United States v. Carolene Products Co.*, the Brennan Block maintained that whites, as a class, do not possess any of the "traditional indicia of suspectness; the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness..."<sup>42</sup> In their opinion, there was no governmental intent to put its stamp of racial hatred or separatism by drawing these racial classifications. The Davis policy was not designed based upon the presumption that one race was inferior to another. In other words, it had no stigmatizing effect. These considerations led the Brennan Block away from the standard of strict scrutiny.

While rejecting strict scrutiny as a standard of review, the Brennan Block was not willing to simply apply the test of relaxed scrutiny: "The fact that this case does not fit

neatly into our prior analytical framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in an equal protection case.”<sup>43</sup> They turned to a set of gender discrimination cases to find the standard of review they thought appropriate, namely that “racial classifications designed to further remedial purposes ‘must serve important governmental objectives and must be substantially related to achievement of those purposes.’”<sup>44</sup> Further, the group that is disadvantaged by the racial preference must not be stigmatized as inferior in any way as a result of the policy. The differences between the compelling governmental purpose necessary under “strict scrutiny” and the important governmental purpose required under the Brennan Block’s analysis are open to debate; however, requiring the policy to be only “substantially related to the achievement of those purposes” is a much lower bar than the narrow tailoring test. This is a standard of review that Justice Brennan called “strict and searching,” but not “strict in theory and fatal in fact,” as he viewed Powell’s analysis.

The Davis admissions policy easily cleared the first hurdle of the Brennan Block’s test – that there be an important government purpose behind the program. The university’s proposition that the policy was necessary to combat the effects of past societal discrimination was considered important enough, particularly when there was a sound basis for concluding that substantial and chronic minority under-representation in the medical school was the result of that past discrimination. In the view of the Brennan Block, the fact that the university had not been found guilty of any specific discriminatory conduct was irrelevant. Court precedent in Title VII and Civil Rights Act

cases suggests, they explained, that legislation authorizing preferential treatment is legal even without any finding of intentional racial discrimination.<sup>45</sup> This precedent, they argued, would “compel the conclusion that States may also adopt race-conscious programs designed to overcome substantial, chronic minority under representation where there is reason to believe that the evil addressed is a product of past discrimination.”<sup>46</sup>

In terms of the second prong of the test, that the program be substantially related to the achievement of the stated goal, the university’s policy once again sailed through in the Brennan Block analysis. Justice Brennan pointed out that the Department of Health, Education and Welfare, the agency which, at the time, was responsible for enforcing the provisions of Title VII and the Civil Rights Act of 1964, had officially endorsed the view that race-based decisions may be made when “failure to do so would limit participation by minorities in federally funded programs...”<sup>47</sup> The conclusion reached by the Brennan Block was that because of the lingering effects of past discrimination, race-conscious admissions designed to ensure educational equality in universities deserved “considerable judicial defense.”<sup>48</sup>

Having concluded that the Davis admissions policy was substantially related to the achievement of an important governmental purpose, the Brennan Block then turned to the question of whether the policy stigmatized any particular group. They concluded that it did not. Bakke’s failure to gain admission to the medical school did not, in the view of the Brennan Block, stamp him as inferior in any way. Additionally, his exclusion from the medical school could not be argued to affect him in the same lasting way that the forced segregation at issue in *Brown* impacted African-American school children.

Ultimately, the Brennan Block concluded that the Davis special admissions program, analyzed under its own approach to strict scrutiny, was constitutional.

For those seeking a clear reading of the *Bakke* precedent, the concurring opinion of the Brennan Block muddies the legal waters significantly. These four Justices, combined with Justice Powell, formed a slim majority holding that race may legally be part of a university's admissions process. They agreed on little else, however. While Justice Powell used the standard of strict scrutiny, Justices Brennan, Blackmun, White and Marshall utilized their own standard of review. While Justice Powell embraced the idea of student body diversity as a compelling state purpose, the other four never even looked for a compelling state purpose. Justice Powell viewed the concept of past societal discrimination as insufficient to justify a racial preference, but the Brennan Block disagreed.

### 3. Separate Concurrences of Justices White, Marshall, and Blackmun

Although they had joined in Justice Brennan's concurrence, Justices White, Marshall, and Blackmun each submitted individual opinions in which they elaborated on their respective points of view. Justice White's opinion dealt ostensibly with Title VII and sheds no new light on the issue of student body diversity, past societal discrimination, or the proper standard of judicial scrutiny in terms of a Fourteenth Amendment Equal Protection analysis. On the other hand, Justice Marshall's opinion represents a stinging critique of the legal history of race and segregation in the United States: "Neither its (the Fourteenth Amendment) history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of

society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors," Justice Marshall concluded.<sup>49</sup> He also chided the Court for not being willing to rule that a class-based remedy for class-based discrimination practiced over several centuries was constitutional. Justice Marshall compared the judicial trends represented by the Court's ruling in *Bakke* to those of the post-Civil War era, a time during which many programs of the radical reconstruction era were dashed by the judiciary. "I fear we have come full circle," lamented Marshall, "This Court in the Civil Rights Cases and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this non-action was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. Now, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California."<sup>50</sup>

In his separate opinion, Justice Blackmun seemed intent on underscoring that affirmative action programs are not only necessary to remedy the lingering effects of past discrimination, but in fact, they are completely congruent with the "original aims" of the Fourteenth Amendment. He also noted that, unless graduate institutions were enlarged to the point that all those who applied could be admitted (a solution he conceded was impractical), it is unavoidable that many deserving applicants will be rejected. Institutions of higher learning have traditionally granted preferences to individuals based upon whether or not an individual was athletically gifted, the child of an alum, or part of a family of affluence or prominence. In light of these types of preferences, Justice

Blackmun found it ironic that the use of race as one criterion for admission could disturb so many so deeply. Decisions related to admissions are outside of the expertise of the judiciary, he reasoned, and are rightfully reserved for academicians.

Both in their joint and separate concurrences, each of the Justices in the Brennan Block seemed intent on reaching a broad ruling supportive of affirmative attempts to build diversity. In an ironic twist, however, their refusal to join with Justice Powell in analyzing the issue under strict scrutiny rendered *Bakke* to be a less powerful precedent today than it might otherwise have been.

#### 4. The “Stevens Block”

Justice Stevens, along with Justices Stewart and Rehnquist and Chief Justice Burger, joined with Justice Powell in viewing the Davis admissions plan as legally unacceptable. Unlike Justice Powell, however, they did not reach their decision on constitutional grounds. In authoring the opinion, Justice Stevens relied on the “settled practice” of avoiding constitutional discussions when a case can be settled fairly based upon statutory grounds, this block of four found that the race-based policy was in violation of Title VI, which forbids any institution receiving federal funds from discriminating on the basis of race or ethnicity. Because the case could be settled on statutory grounds, he reasoned, “the question of whether race can ever be used as a factor in an admissions decision” was irrelevant and did not appropriately warrant discussion.<sup>51</sup>

## B. The Supreme Court in Non-Educational Settings

The *Bakke* split has made that decision difficult for subsequent courts to interpret. Justice Powell's opinion stands in isolation as the only one to endorse diversity as a compelling governmental interest or strict scrutiny as the proper standard of review for racial classifications. Though *Bakke* represents the only Supreme Court precedent on the question of student body diversity as a compelling interest, there have since been several Supreme Court decisions from outside the realm of education that have helped to solidify Justice Powell's position regarding strict scrutiny.

### 1. *Wygant v. Jackson Board of Education*

Decided in 1986, *Wygant v. Jackson Board of Education* involved a school system as a litigant; however, it is more appropriately considered an employment case than an education case.<sup>52</sup> It stemmed from a race-sensitive layoff provision that was part of a collective bargaining agreement adopted in 1972 by the school board of Jackson City, Michigan and the local union. The agreement stated that, in the event teachers were to be laid off, the last to be hired would be the first to go, provided that the percentage of minority teachers laid off did not exceed the percentage of minority teachers across the district. Two years later, when layoffs became necessary, the school board realized that in order to follow the terms of this particular section of the agreement (Article XII of the collective bargaining agreement), they would have to lay off non-minority teachers with tenure and retain non-tenured minority teachers. The board chose not to comply with Article XII, and as a result failed to maintain the percentage of minority teachers that had existed prior to the layoffs. The union, along with two minority teachers who had been laid off, filed suit against the district in federal court, claiming that the district had violated both the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964.



The board countered this argument with the claim that Article XII was in conflict with the Michigan Teacher Tenure Act. Because the plaintiffs could provide no evidence of prior discrimination by the district and because they had not followed the proper procedure for filing a claim under Title VII, the federal district court reached the conclusion that it had no jurisdiction over the issue.

The plaintiffs, rather than appealing the federal court ruling, chose to take the case to the state courts. Finding no evidence of any prior discrimination in hiring on the part of the board, the state court ruled that the minority under-representation on the teaching staff in the district was purely the result of “societal discrimination.” Nevertheless, they held that Article XII was justified as a means of correcting the ill effects of this societal discrimination. Subsequent to this state court ruling, the school district began to follow the mandates of Article XII fully. During at least two different school years (1977-78 and 1981-82), the district was forced to lay off tenured non-minority teachers and retained non-tenured minority teachers. As a result, litigation was initiated by displaced non-minority teachers in federal court, claiming that the implementation of Article XII violated the Equal Protection Clause of the Fourteenth Amendment as well as Title VII.

The Federal Court for the Eastern District of Michigan granted summary judgment to the board on the issue. In dismissing the claims of the plaintiffs, the district court ruled that the racial preferences in Article XII did not need to be grounded in any finding of discrimination in the board’s prior hiring practices. The policy, in the view of the court, was justified as a means of countering the effects of societal discrimination and helping provide positive role models for minority school children. Upon appeal to the United States Court of Appeals for the Sixth Circuit, the decision of the district court was supported fully. The plaintiffs then appealed to the United States Supreme Court, which agreed to hear the case.

The Supreme Court, in a five to four decision, reversed the holdings of the district and circuit courts, concluding that societal discrimination was an insufficient justification for imposing a racial classification. Justice Powell authored the opinion of the plurality in which he was joined by Chief Justice Burger and Justice Rehnquist. Even if the justifications for the layoff policy were sufficiently compelling, the design of the policy was not sufficiently narrow. Hiring goals, for example, would be a less-restrictive way of reaching the same end, since a person denied employment is not as negatively impacted as one who suddenly loses an existing job.

Justice O'Connor authored a concurring opinion that is of particular interest in this case. A remedial purpose that may justify such racial classifications, she asserted, "need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has firm basis for believing that remedial action is required. Additionally, although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest."<sup>53</sup>

Though *Wygant* does not deal with the question of race-based admissions, a legal principle that emerged helped to clarify the way in which the courts would examine future policies. The most interesting and relevant holding from the *Wygant* case is not what the Court concluded with regard to the specific layoff provision, but the fact that four Justices joined in concluding that racial classifications, regardless of who they help or hinder, are inherently suspect and must be examined under strict scrutiny. This, of course, added weight to Justice Powell's conclusion from *Bakke* that such a policy must be justified by a compelling state purpose and narrowly tailored to achieve that purpose.

## 2. *Richmond v. J.A. Croson*

The Supreme Court once again confronted “the tension between the Fourteenth Amendment’s guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society” in the key 1989 decision *Richmond v. J.A. Croson*.<sup>54</sup> This case dealt with a Richmond, Virginia ordinance that required all contractors interested in bidding for city business to subcontract at least thirty percent of any given contract to minority business enterprises. The plan was debated and adopted at a Richmond City Council meeting in April of 1983. Advocates of the plan pointed out the fact that, while the African-American population in Richmond was at fifty percent, less than one percent of the city’s construction contracts had been awarded to minority businesses. One of the councilpersons who favored the measure testified that he was very familiar with construction industry practices in Richmond and throughout Virginia and that racial discrimination was widespread.<sup>55</sup>

There was no direct evidence of discrimination on the part of the city or any of its primary contractors presented at the council meeting, and many in attendance expressed opposition to the proposal and concern about its legality. Various contractor associations sent representatives to the council meeting and questioned whether there were sufficient numbers of minority contractors in the area to satisfy the thirty percent set-aside. One representative of the contractors pointed out that less than five percent of the nation’s contractors were minority-owned and nearly half of those were concentrated in the states of California, New York, Hawaii, Florida, and Illinois. A councilperson subsequently

expressed concerns that there would be a loss of jobs for local workers, whether minority or not, because of the need to bring in minority businesses from outside the state to fulfill the thirty percent quota. The same councilperson also suggested that, because of his concerns about the legality of the proposal, the city should check with an attorney before approving the measure. Despite the opposition arguments, the council approved the plan by a vote of six to two.

In early September of 1983, the city invited contractors to bid on a large plumbing project at the city jail. Eugene Bonn, the manager of the plumbing and heating contractors known as J.A. Croson Company, received bid forms and prepared to tender an offer to the city. The job included the installation of numerous plumbing fixtures and specified that they be produced by one of two companies: Acorn Engineering or Bradley Manufacturing. The provision of these fixtures would amount to greater than half of the total contract value. Bonn decided that the best way to satisfy the thirty percent set-aside would be to find a minority contractor to supply the fixtures. In late September, Bonn contacted several minority businesses regarding the job, none of which expressed any interest in the project. On October 12<sup>th</sup>, the day the bid was due to the city, Bonn again attempted to contact a group of minority businesses to solicit their participation and a minority business by the name of Continental Metal Hose Company accepted the job. Continental's participation hit a snag, however, when the supplier of the fixtures refused to do business with them until they had passed a credit check, which would take up to thirty days. Because the supplier would not work with them, Continental was unable to tender a bid to Croson.

The Croson Company, despite its problems in obtaining Continental's bid, submitted its bid to the city on time and, as the only company to bid on the job, was awarded the business. A week after the initial bid was submitted, Croson submitted a request for a waiver from the thirty percent set-aside, arguing that there were no "qualified" minority businesses ready and willing to participate in the job. Thereafter, the City denied Croson's request for a waiver and told him he had ten days to submit the proper paperwork indicating his intention of using Continental.

Continental's subsequent bid for the fixtures was almost seven thousand dollars more than what Croson had already secured in his own bid. With bonding and insurance figured in, the use of this particular minority business would have added \$7,663 to the cost of the project. In early November, Croson appealed again to the city, asking either for a waiver, or the ability to adjust the amount of the bid to compensate for the added expense of using Continental. The City not only denied the request of Croson, but they informed the company that they intended to re-open the job to bidding. Croson subsequently filed suit in United States Court for the Eastern District of Virginia, claiming that the Richmond set-aside violated the Equal Protection Clause of the Fourteenth Amendment.

The district court and the United States Court of Appeals for the Fourth Circuit sided with the city. The tone of both decisions was that, in such cases, the courts should give great deference to the judgment of legislative bodies. As precedent, the courts relied on the 1980 Supreme Court decision in *Fullilove v. Klutznick*, in which the Court suggested that federal statutes should not be examined under strict scrutiny.<sup>56</sup> If the

evidence suggested that the Richmond City Council could reasonably conclude that the disparity in minority contracts was, at least in part, a result of private and governmental discrimination, then the set-aside could be justified. During the time that this case was in litigation, the Court issued the *Wygant* decision, in which four Justices had agreed that all racial classifications must be reviewed with strict scrutiny. Accordingly, when Croson appealed the decision to the Supreme Court, the Court vacated the decision of the Fourth Circuit and remanded the case for further consideration under the standard of strict scrutiny.

On remand, the Fourth Circuit analyzed the Richmond program using strict scrutiny and found that it was not justified by a compelling state purpose. “Broad brush assumptions of historical discrimination,” it concluded, were not sufficient to pass the compelling interest test. Further, even if there were a compelling interest at stake, the thirty percent set-aside figure was chosen arbitrarily and bore no relationship to any other relevant number and, as such, was not sufficiently narrowly tailored. The Supreme Court subsequently affirmed the ruling of the Fourth Circuit, striking down the Richmond policy by a vote of six to three. It is particularly noteworthy to mention that this is the first Supreme Court decision in which five Justices (Chief Justice Rehnquist, Justice O’Connor, Justice White, Justice Kennedy, and Justice Scalia) went on record in holding that strict scrutiny was the appropriate standard of review for any race-based classification.<sup>57</sup>

Justice O’Connor authored the plurality opinion, joined by the Chief Justice Rehnquist (who had recently replaced retiring Chief Justice Burger), Justice White, and

Justice Kennedy. She suggested that, though evidence of prior discrimination on the part of the city or its primary contractors might have justified racial classifications, no such evidence existed in this case. In her opinion, Justice O'Connor strongly challenged the viability of Justice Marshall's dissenting opinion, which suggested that, because the racial preferences in this case were benign (designed to address remedial goals), they should be subjected to a relaxed standard of review: "How the dissent arrives at the legal conclusion that a racial classification is 'designed to further remedial goals,' without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis, we are not told."<sup>58</sup> In reaching the conclusion that strict scrutiny was the appropriate standard of review in this particular case, Justice O'Connor pointed to the fact that the Richmond program, like the Davis special admissions program in *Bakke*, "disqualified non-minorities from consideration for a specified percentage of opportunities." Therefore, as Justice Powell had applied heightened scrutiny to the Davis admissions policy in *Bakke*, so should the Court do in this particular case. In a concurring opinion, however, Justice Scalia dissented with the plurality, suggesting that past discrimination by private parties can never substantiate the creation of racial classifications by a governmental entity. In his view, the only circumstance in which the government may grant preferential treatment is when remedying its own misconduct.

### 3. *Adarand v. Peña*

In 1995, the Supreme Court issued yet another decision that, in effect, clarified the Court's position with regard to the level of scrutiny that should rightfully be applied in cases involving governmental preferences based upon race. The case emanated from a

federal program designed to encourage the use of businesses run by “socially and economically disadvantaged individuals.”<sup>59</sup> Primary contractors were offered financial incentives for sub-contracting work to businesses certified as socially or economically disadvantaged by the Small Business Administration. Minority-run businesses were automatically presumed to qualify and received the requisite certificate from the government. In 1989, the Federal Department of Transportation, through its Central Lands Highway Division, awarded the primary contract for a Colorado highway project to Mountain Gravel and Construction Company, which, in turn, solicited bids for sub-contractors that specialized in building guardrails. Adarand Constructors submitted the lowest bid, but it was rejected in favor of Gonzales Construction, a business that was certified by the Small Business Administration as being controlled by socially or economically-disadvantaged persons.

The awarding of the contract to Gonzales was a result of the financial incentive offered to Mountain Gravel and Construction for hiring such a business, and Adarand subsequently filed suit in federal court, challenging the federal law (in particular the use of race in identifying qualified small businesses) as unconstitutional.<sup>60</sup> The district court granted the government’s motion for summary judgment and the United States Court of Appeals for the Tenth Circuit affirmed. Because the challenged statute was a federal law, both the district court and the Tenth Circuit applied a less exacting standard of scrutiny. The majority of the Supreme Court, however, felt that the lower courts had utilized the wrong standard of review, and in a five to four split, vacated the judgment of the Tenth



Circuit and remanded the case to the trial court for further consideration – this time under the proper standard of strict scrutiny.

A full analysis of *Adarand* is very intriguing in that it underscores the continuing disagreement among the Justices on various aspects of affirmative action. The decision featured a new majority comprised of Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, Justice Scalia, and newly-appointed Justice Thomas (who replaced Justice Marshall on the Court in 1991). *Adarand* is also the first Supreme Court case dealing with affirmative action in which new Court appointees Justices David Souter, Ruth Bader Ginsberg, and Steven Breyer participated. Interestingly, in this case, these three new Justices, along with Justice Stevens, either wrote or joined in dissenting opinions.

Justice O'Connor, writing for a plurality of herself, Chief Justice Rehnquist and Justice Kennedy, concluded that when analyzing Supreme Court precedent, one of the unifying concepts that arises is that all racial preferences must be viewed with great skepticism and be subject to a "searching examination." Further, she suggested, Court precedent makes it clear that consistency must also be a prime consideration in equal protection analysis. In other words, the standard of review shall not hinge in any way upon the race or ethnicity of those burdened or benefited. Justice O'Connor's opinion is rounded out by the brief concurrences of Justice Scalia and Justice Thomas. In his concurrence, Justice Scalia echoes the hard line approach that he articulated in *Croson*, concurring with the plurality that all racial classifications are deserving of strict scrutiny and adding that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite

direction.”<sup>61</sup> Justice Thomas, in his concurring opinion, took the opportunity to chide dissenting Justices Stevens and Ginsberg for what he called “racial paternalism,” drawing a “moral and constitutional equivalence” between laws designed to “subjugate a race” and those designed to “foster some current notion of equality” by creating racially-based preferences.<sup>62</sup> Justice Thomas left no doubt as to his philosophical stance regarding affirmative action programs in general when he wrote: “So-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence.”<sup>63</sup> Ironically borrowing language from the *Brown* decision, Justice Thomas punctuated his distaste for affirmative action by theorizing that such programs “stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”<sup>64</sup>

Interestingly, Justice Stevens, who authored the opinion of the Stevens Block in the *Bakke* decision, wrote a dissenting opinion in *Adarand* in which he is joined by Justice Ginsberg. In his dissent, Justice Stevens did not take issue with the plurality’s assertion that all racial classification should be met with skepticism. He did, however, take extreme exception to the plurality’s conclusion that consistency was called for in equal protection analysis. The presumption underlying the plurality opinion and expressed pointedly in Justice Thomas’ concurring opinion was that there was no difference between so-called “benign” discrimination and more invidious discrimination motivated by the desire to subjugate certain races. “There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that

seeks to eradicate racial subordination,” Justice Stevens asserted, “Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.”<sup>65</sup>

Though not related to the field of education, the Supreme Court decision in *Adarand* is a very relevant to the issue of race-based school admissions programs and has been frequently cited in subsequent cases. This decision, along with the decisions in *Wygant* and *Croson*, seems to have firmly established the concept of strict scrutiny, as described by Justice Powell in *Bakke*, as the appropriate standard of review for any race-based classification, regardless of whether or not the purported purpose of such classification is “benign.”

### C. Today’s Supreme Court and *Bakke*

The split on the *Bakke* Court, along with subsequent decisions in *Wygant*, *Croson*, and *Adarand*, has made it difficult for today’s lower federal courts to agree upon just what type of precedent it represents. The Fifth Circuit summed up that difficulty succinctly: “The Court reached no consensus. The two major opinions – one four-Justice opinion by Justices Brennan, White, Marshall, and Blackmun and one by Justice Stevens in which Chief Justice Burger and Justices Stewart and Rehnquist joined – reflected completely contrary views of the law...Hence, Justice Powell’s opinion has appeared to represent the ‘swing vote’ and though, in significant part, it was joined by no other Justice, it has played a prominent role in subsequent debates concerning the impact of *Bakke*.”<sup>66</sup> Those who hypothesize that the Court, were it to address the issue today,

would hold that diversity is not sufficiently compelling to justify race-based policies may or may not be correct. Though it is impossible to predict what the Court might do in such a case, one may look at the changes on the Court since the *Bakke* decision and make an educated guess.<sup>67</sup>

Of the Stevens Block (Chief Justice Burger, Justice Rehnquist, Justice Stevens, and Justice Stewart), which held that the Davis policy violated Title VI, two Justices (Rehnquist and Stevens) remain on the Court in 2002. Rulings in subsequent cases indicate that Chief Justice Rehnquist would adopt a position akin to the one held by the Stevens Block were the Court to be faced with a similar case today. When Justice Rehnquist replaced Burger as the Chief Justice in 1986, Justice Antonin Scalia was appointed to take his former spot on the Court. An appointee of former President Ronald Reagan, Justice Scalia's concurring opinions in *Croson* and *Wygant* make it abundantly clear that he would likely have sided with the Stevens Block had he been on the Court at the time of *Bakke* and would in any similar future cases. Justice Sandra Day O'Connor, another Ronald Reagan appointee, replaced the final member of this block, Justice Stewart, in 1986. Justice O'Connor is viewed as a moderate conservative and frequently represents the swing vote when today's Court is divided. Her opinions in both *Croson* and *Adarand*, however, indicate that she may be more philosophically aligned with Justice Powell than with Justice Scalia. Though he authored the opinion and is the namesake of the Stevens Block, Justice Stevens's passionate dissent in *Adarand* casts significant doubt as to whether he would align himself with Justices Scalia and Rehnquist in any future affirmative action cases. Therefore, of these four positions on the Court,

only Chief Justice Rehnquist and Justice Scalia can be counted on to take a hard-line stance against affirmative action programs in general.

The Brennan Block (Justices Brennan, Blackmun, Marshall, and Powell) is no longer intact. Justice David Souter replaced Justice Brennan in 1990, and Justice Blackmun was replaced in 1994 by Clinton appointee Justice Steven Breyer. Justices Souter and Breyer joined together to dissent in *Adarand*; however, their dissent was based primarily on their belief that the majority had ignored the principle of *stare decisis* and cannot be viewed as a signal of how they might rule in a case similar to *Bakke*. While Justice Souter is difficult to pin down in terms of political ideology, Justice Breyer is generally viewed as a moderate liberal by today's standards. Although both Justices tend to adopt moderate stances on issues (as opposed to the very conservative stances of Justice Scalia and Chief Justice Rehnquist), how they would rule on a future case like *Bakke* is difficult to predict. Justice White was replaced in 1993 by another Clinton appointee, Justice Ruth Bader Ginsberg, who, by joining with Justice Stevens in the *Adarand* dissent, clearly seems to be open to the concept of affirmative action. Justice Marshall, unquestionably the most vocal proponent of affirmative action during his tenure on the Court, was replaced by Justice Clarence Thomas in 1991. Justice Thomas, an appointment of former President George Bush, has shown through his concurrences in both *Adarand* and *Missouri v. Jenkins* that there may be no more ardent an opponent of affirmative action than he. Justice Anthony Kennedy, an appointment of Ronald Reagan, replaced Justice Powell in 1988. Though not as conservative as Chief Justice Rehnquist

and Justices Scalia and Thomas, Justice Kennedy is predictably conservative and sides most frequently with these Justices.

Any decision dealing with this issue on today's Court would likely see a divided court with Chief Justice Rehnquist, Justice Scalia, Justice Thomas and Justice Kennedy aligned against Justice Stevens, Justice O'Connor, and Justice Ginsberg. The "X" factors and potential swing votes would be Justices Souter and Breyer. If either of these Justices sided with the Chief Justice's block, Powell's opinion in *Bakke* could be overturned.

Table 1 summarizes the changes in the make-up of the Court from the *Bakke* era to today.

#### D. Chapter Summary

The meaning of *Bakke* as precedent on the issue of race-based admissions is largely unclear. Justice Powell, along with the Brennan Block, ruled that race may sometimes be used as one factor in making admissions decisions in higher education. Justice Powell, by himself, asserted that student body diversity is a compelling governmental interest. None of the other four Justices made that specific claim because their standard of review did not require that the state demonstrate a compelling purpose. It is both reasonable and logical to assume that more than one of the Brennan Block, which endorsed the Davis policy as legal, would have agreed with Justice Powell on the compelling importance of student body diversity had their standard of review in the case made the consideration of that point necessary. It is perhaps ironic that, in ruling for diversity on broader grounds and refusing to join with Justice Powell in analyzing the issue under strict scrutiny, they rendered *Bakke* to be a less powerful precedent today than it might have been.

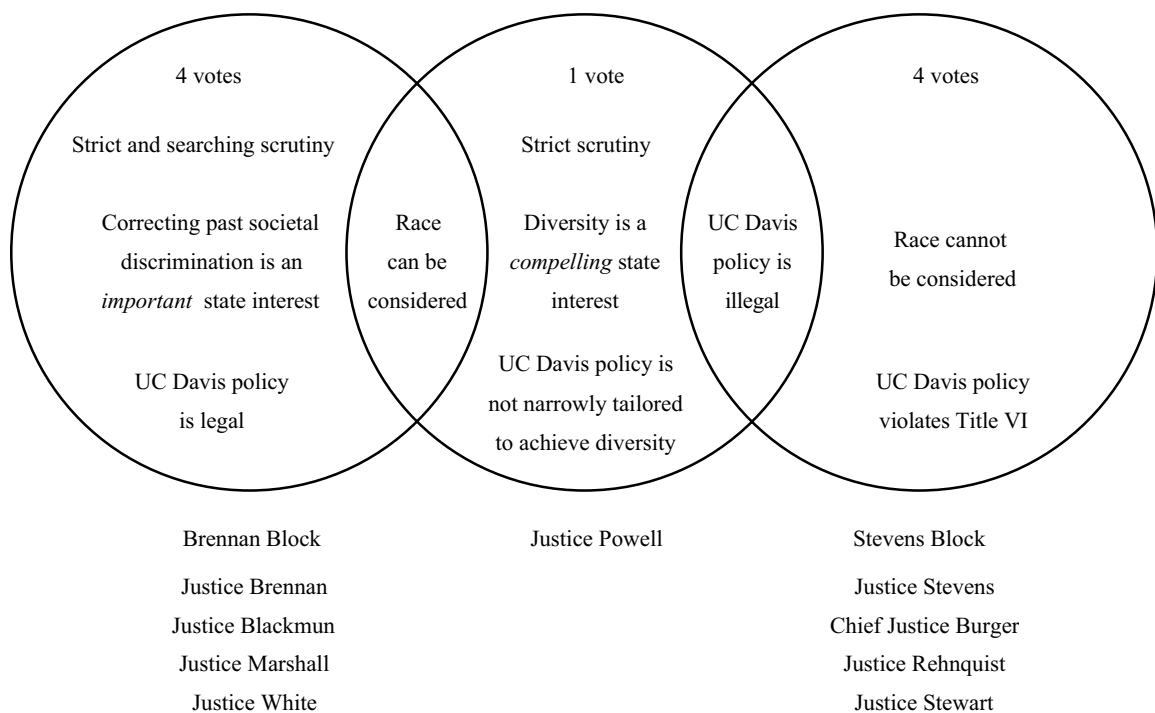
Table 1: The Supreme Court from *Bakke* to 2002

<i>BAKKE</i> COURT	CURRENT COURT	NOMINATING PRESIDENT	YEAR	COMMENTS
Chief Justice Warren Burger	Chief Justice William Rehnquist	Ronald Reagan	1986	Burger and Rehnquist sided together on <i>Bakke</i> , found policy violative of Title VI
Justice William Rehnquist	Justice Antonin Scalia	Ronald Reagan	1986	Scalia likely would have sided with Rehnquist had he been on <i>Bakke</i> Court.
Justice Potter Stewart	Justice Sandra Day O'Connor	Ronald Reagan	1986	Often considered the swing vote on today's Court, she frequently sides with the conservatives. Language in her decision in <i>Wygant</i> , however, suggests that she may be more open-minded to diversity as a compelling state purpose than her conservative colleagues.
Justice Paul Stevens	Remains on the Court	Gerald Ford	1974	<i>Wygant</i> opinion suggests he might be closer to Powell's viewpoint than <i>Bakke</i> decision would suggest.
Justice Lewis Powell	Justice Anthony Kennedy	Ronald Reagan	1988	Kennedy frequently aligns himself with conservatives Scalia, Thomas, and Rehnquist.
Justice Byron White	Justice Ruth Bader Ginsberg	Bill Clinton	1993	If recent employment cases are indicative, Ginsberg is a likely candidate to support Powell's point-of-view. In fact, she may have joined with the Brennan Block had she been on the Court at the time.
Justice Thurgood Marshall	Justice Clarence Thomas	George Bush	1991	A conservative Justice and an outspoken critic of affirmative action, Thomas would be unlikely to join in any opinion supportive of a race-based policy.
Justice Harry Blackmun	Justice Steven Breyer	Bill Clinton	1994	Breyer is a likely candidate to be supportive of Powell's opinion in <i>Bakke</i> .
Justice William Brennen	Justice David Souter	George Bush	1990	Enigmatic Justice is hard to read. His dissent in <i>Adarand</i> distinguishes him from other Bush and Reagan appointees. He is likely a swing vote on any future case.

Conversely, the refusal of the Stevens Block to analyze the constitutional aspects of this case left us lacking in any articulated constitutional arguments concerning why student body diversity does *not* serve a compelling state purpose. Justice Powell combined with them to form a majority of five who felt that the Davis admissions

program was illegal, but he was the only Justice to reach that conclusion on constitutional grounds. Though Justice Powell's opinion in *Bakke* is often criticized as standing in isolation and somewhat out of step with his judicial peers, the philosophy upon which it was based foreshadowed judicial reasoning in later cases. Figure 2 illustrates the areas of overlap in the opinions of the Justices involved in the *Bakke* split.

Figure 2: The *Bakke* Split



A trio of non-education cases (*Wygant*, *Croson*, and *Adarand*) solidified the judicial principle that all racial classifications are appropriately analyzed under strict scrutiny, thus discrediting the point-of-view of the Brennan Block in *Bakke*. However, any pronouncement based on these cases that Justice Powell's opinion in *Bakke* is no longer binding precedent may be premature. With the changes on the Court since *Bakke*,



there is the temptation to try to predict how today's Supreme Court might rule on a case similar to *Bakke*. Any such prediction, however, is purely speculative. For these reasons, there continues to be confusion in the legal community over whether or not *Bakke* is still good law.

CHAPTER III

INTERPRETING SUPREME COURT PRECEDENT

IN THE FEDERAL CIRCUITS

A. Key Federal Circuit Cases

A review of key cases reveals disagreement between the circuits over the legality of race-sensitive school admissions and transfer policies; however, each of these courts generally uses the same guidelines in reaching different conclusions. It is agreed that such policies demand strict judicial scrutiny, and therefore must be justified by a compelling governmental interest and be narrowly tailored to serve that interest. The disagreement centers on whether diversity is a “compelling governmental interest” and, if so, how a policy can be effectuated to assure that it is “narrowly tailored.” The Supreme Court precedent of *Bakke* established that race could be one of several factors considered when making admissions decisions at an institution of higher learning. While empirical research will not necessarily resolve the tension, it will draw out common threads and themes and therefore suggest some practical charter school policy alternatives that likely will pass constitutional muster.

1. *Hopwood v. Texas*

The United States Court of Appeals for the Fifth Circuit’s 1996 decision in *Hopwood v. State of Texas* was the result of a lawsuit that Cheryl Hopwood, along with three others, initiated after they were all denied admission to the University of Texas Law

School in 1992. The law school had an admissions policy that was weighted to the advantage of minority students. Under the system, minorities were eligible for admission even when their “Texas Index” (TI) scores were below the level at which non-minorities would be denied. The TI was a combination of LSAT score and undergraduate GPA that the university used to rank prospective students. For white students, a TI score of 199 meant almost certain admission, while 192 was an almost certain denial. Minority students, however, were generally assured admission with a TI of 189 or greater and were not ruled out unless their TI dipped to 179 or lower. Therefore, a minority student with a TI of 189 would almost certainly gain admission but a white student with a TI of 192 almost certainly would not. Hopwood and the three other plaintiffs were denied admission to the law school as a result of this policy. They filed suit in federal court, claiming that the policy was illegal reverse discrimination and violated their Fourteenth Amendment Rights to Equal Protection of the law.

In determining whether the law school policy was constitutionally permissible, the Fifth Circuit required the law school to show a compelling governmental justification. The law school argued that the policy was necessary in order to increase diversity, combat a perceived hostile environment against minorities, help improve the poor reputation of the law school in the minority community, and eliminate the effects of past discrimination. The Fifth Circuit rejected the purposes put forth by the law school as sufficiently compelling to justify the race-based policy. Only Justice Powell’s “lonely opinion” in the *Bakke* case, the majority held, suggests that diversity outside of a remedial setting can ever serve a compelling governmental interest. “Diversity fosters,

rather than minimizes the use of race,” wrote Circuit Judge Smith, “It treats minorities as a group, rather than as individuals.”<sup>68</sup> The majority held that race could no longer be a factor considered in the admissions process. Interestingly, however, the majority in *Hopwood* left the door open to the use of various other factors in making admissions decisions. One such possibility explicitly raised by Circuit Judge Smith is the consideration of prospective students’ socio-economic background, a factor that he conceded may be closely aligned with race.

## *2. Johnson v. Board of Regents*

The most recent United States Court of Appeals ruling related to race-sensitive admissions comes from the Eleventh Circuit. In August of 2001, the Eleventh Circuit issued a ruling striking down the race-sensitive admissions policy at the University of Georgia (UGA).<sup>69</sup> Undoubtedly the “flagship” of the state’s university system, UGA had operated as an all-white institution for 160 years before the first African-American students were admitted in 1961. In 1969, the Office of Civil Rights voiced its displeasure with the university’s lack of progress in the area of desegregation and, in 1970, mandated the Board of Regents to implement a “desegregation plan,” including programs of affirmative action deemed necessary to eradicate the “vestiges of discrimination.” By 1989, however, the Office of Civil Rights advised the university that it was in compliance with Title VI and that no additional desegregation measures were required.

The message of the Office of Civil Rights was accompanied by the caveat that the university must remain in compliance with Title VI. Because applications for freshman admissions greatly exceeded the number of spaces available, admission was competitive.

Concerned about maintaining diversity in freshman admissions and remaining in the good graces of the Office of Civil Rights, the university continued to use a race-sensitive approach to admissions. Between 1990 and 1995, it had a “dual track” system of admissions in which non-white applicants were held to lower minimum standards on admissions criteria such as SAT scores and grade point averages. By the mid-nineties, the university began to question the constitutional viability of its policies and, as a result, completely re-designed the policy by the time the freshman class of 1996 was admitted. It was the redesigned policy at issue in *Johnson v. Board of Regents*.

The new policy divided the admissions process into three distinct stages: the first notice stage, the total student index (TSI) stage, and the edge read (ER) stage. During the first notice stage, admissions officials considered student applications based on SAT and Academic Index (AI), which is a composite of SAT and GPA. Students whose AI and SAT scores exceeded a preset number were automatically admitted, without regard to race, gender, or any other non-academic factor. Those students who fell beneath a preset minimum were automatically rejected. It was during this first notice stage that the majority of freshman admissions were granted. Those students whose AI and SAT scores were not high enough to win admission during first notice, but not so low that they were rejected automatically, were passed through to the TSI stage of admissions.

The TSI stage was designed to consider a mixture of academic, extra-curricular, demographic, and other variables. During this stage, prospective freshmen were awarded points based on twelve factors. Four academic factors, the Academic Index, SAT, GPA, and curriculum quality, were considered in this stage and accounted for sixty-

seven percent of the total available points. In addition to the four academic variables, there were five “leadership/activity” variables considered: parent or sibling ties to the UGA, hours spent on extra-curricular involvement, hours spent on summer work, hours spent on school work, and whether the student would be a first generation college student. These five variables together constituted eighteen percent of the maximum available points. The final three factors were in-state residency, gender, and race or ethnicity, with non-whites and males being awarded preference. These three factors combined could account for one and a half points, or fifteen percent of the maximum total. Those applicants who identified themselves as African-American, Hispanic, Asian or Pacific Islander, American Indian, or multi-racial were awarded a half-point. The university admitted all students whose TSI scores were at 4.93 or greater and rejected all those whose scores were 4.66 or lower. Because of the half-point awarded based upon race, a non-white applicant could be admitted with a TSI of 4.43 or greater on all other factors combined, while white applicants needed to score the full 4.93 in order to win admission at the TSI stage. Additionally, a non-white student might have as little as 4.16 on the other eleven variables and, with the half-point boost for race, meet the minimum cutoff. White students, on the other hand, were summarily rejected if their score on the other eleven factors fell below 4.66.

Students whose TSI scores fell between 4.66 and 4.93 moved on to the third stage of admissions, known as the edge read, or “ER” stage. At the ER stage, all surviving applicants started with a score of zero and admissions officers would read and qualitatively evaluate their files in search of qualities that may have been overlooked at

the first and second stages. Those who earned ER scores at a certain level were accepted; those who scored below that level were rejected. Race or ethnicity was not a consideration at this stage. Also, this was the only stage at which information was read and evaluated qualitatively rather than simply using numerical formulas to process information on a student's application.

The constitutional issue involved the consideration of race at the second (TSI) stage of admissions. The three plaintiffs in this particular case were all denied admission at the TSI stage. Plaintiff Johnson, a white female, received a TSI score of 4.10. Even with the half-point bonus for ethnicity, she would have failed to make the minimum cutoff at the TSI stage. With an extra quarter-point gender bonus awarded to male applicants, however, she would have had a 4.85, which would have qualified her for consideration at the ER stage. Plaintiff Beckenhauer, a white female, earned a TSI of 4.06. Like Johnson, with the extra .75 for race and gender she would have passed through to the ER stage. Plaintiff Bogrow, a white female with a TSI of 4.52, would have earned admission at the TSI stage if given the .75 consideration for race and gender.

In 1999, after this lawsuit had been filed, but before the district court had made a decision, UGA announced that gender would no longer be a consideration in admissions decisions. In district court, the university argued that they had a compelling interest in creating diversity in its freshman class. Former UGA President Charles Knapp offered testimony regarding the benefits of diversity, which the district court dismissed as speculative. Having ostensibly rejected the merits of diversity as a compelling state interest, the district court granted summary judgment to the plaintiffs without considering

the question of whether the policy was sufficiently narrowly tailored. Soon thereafter, the university announced that they would discontinue the use of race in admissions until such a time that their appeal was resolved.

The first question the Eleventh Circuit considered in this case was when, if ever, student body diversity may be considered a compelling governmental interest. The Eleventh Circuit opinion discussed the question extensively, but did not answer it definitively. Instead, the court assumed that student body diversity may be a compelling interest and concentrated its examination on whether UGA's freshman admissions policy was sufficiently narrowly tailored to serve that purpose. The Eleventh Circuit concluded that it was not: "By mechanically and inexorably awarding an arbitrary 'diversity' bonus to each and every non-white applicant at the TSI stage," Circuit Judge Marcus elaborated, "and severely limiting the range of other factors that may be considered at that stage, the policy contemplates that non-white applicants will be admitted or advance further in the process at the expense of white applicants with greater potential to contribute to a diverse student body. The lack of flexibility is fatal to UGA's policy."<sup>70</sup> Though the Eleventh Circuit does not go the same length that the Fifth Circuit did in declaring *Bakke* bad law, the *Johnson* decision supports the prevailing judicial philosophy that all racial classifications must be examined under strict scrutiny.

### 3. Race-Sensitive Admissions in Public Schools

#### a. *Wessman v. Gittens*

The first case to address race-sensitive admissions in a public school is *Wessman v. Gittens*, which the United States Court of Appeals for the First Circuit dealt with two



years after the *Hopwood* decision. The Boston Latin School, a public school with a selective admissions process, had operated with a thirty-five percent set-aside for African-American and Hispanic students for approximately two decades. This practice was the result of the settlement of a federal lawsuit in the mid-1970s. In 1987, the First Circuit concluded that Boston's public schools had achieved unitary status in the area of student assignments, but the Boston Latin School continued the thirty-five percent set-aside until it was challenged in Federal District Court in 1995. The Boston Latin School, along with the other examination schools in the Boston system, discontinued the use of the racial set-aside in 1995. School administrators were concerned that minority enrollment would drop sharply as a result, so they began studying admissions policy alternatives that might prevent a decline in minority enrollment but remain within constitutional boundaries. The result was a policy implemented in the 1997-98 school year in which half the available admissions were awarded purely on the basis of merit and the other half were divided among various ethnic groups based upon their proportion of the total remaining qualified applicant pool.<sup>71</sup> If, for example, there were two hundred openings, the first hundred would be given to the students with the top test scores. If the remaining qualified applicant pool consisted of twenty-five percent African-American, twenty-five percent Hispanic, twenty-five percent Asian, and twenty-five percent white, then the remaining hundred openings would go to the twenty-five students from each group with the highest test scores. The difficulty with this arrangement was that the twenty-sixth white student could be rejected in favor of a minority student with lower test scores. This is exactly what happened to Sarah Wessman, along with ten other white

students. As a result, Wessman's father filed suit in federal court, claiming that the policy constituted a denial of his daughter's Fourteenth Amendment Right to Equal Protection.

Although the district court ruled against Wessman, the First Circuit found that the school's admissions policy could not withstand strict scrutiny. Circuit Judges Selya and Boudin were not willing to go as far as the Fifth Circuit had in declaring that diversity outside of a remedial context is never sufficiently compelling to justify a race-based policy. They did, however, question the tailoring of the policy, suggesting that its focus on racial diversity alone would ultimately undermine other, more meaningful forms of diversity. The policy's focus on racial diversity, at the expense of other race-neutral student characteristics or traits that might contribute to educational diversity, proved to be a fatal flaw in the conception of the policy. In a two-to-one decision, the court viewed the policy not as a tool for true diversity so much as an attempt at racial balancing.

b. *Tuttle v. Arlington County*

Another case involving race-sensitive admissions in public schools is *Tuttle v. Arlington County School Board*, which dealt with the Arlington Traditional School (ATS), an alternative school operated by the school system of Arlington County, Virginia. In the interest of promoting diversity within the student body, ATS devised a lottery system of admissions that was weighted with regard to the applicant's socio-economic background, native language, and racial or ethnic background. The policy, which was implemented in the 1998-99 school year, granted admission to students whose older siblings were already at the school. Twenty-three of sixty-nine slots available in

the school that year were awarded to siblings, leaving only forty-six openings available to 162 other applicants, who were to be chosen by lot. In order to achieve a student body “in proportions that approximate the distribution of students from those groups in the district’s overall population,” the policy called for the weighting of the lottery so that students with certain diversity factors would more likely be selected.<sup>72</sup>

Grace Tuttle and Rachel Sechler were kindergarten applicants without siblings at ATS and were not awarded an increased probability of selection in the lottery based on diversity factors. They were not selected by lot and, thus, not offered admission to ATS. The parents of Tuttle and Sechler sought and were granted injunctive relief in a federal district court. Using strict scrutiny, the court held that diversity was not a sufficiently compelling governmental interest to warrant the ATS admissions policy. On appeal to the United States Court of Appeals for the Fourth Circuit, however, the district court’s declaration that diversity was never a compelling government interest was overturned. The Fourth Circuit, while not necessarily endorsing the concept, was not ready to directly challenge the legitimacy of Justice Powell’s view in *Bakke* of diversity as a compelling interest. The appellate judges proceeded upon the assumption that diversity could be a compelling state interest, but they struck down the ATS weighted lottery system based on its failure to pass the narrow tailoring test. Most notably, the court viewed the school system’s goal of achieving a certain racial mix at ATS that approximated the district population as a whole to be racial balancing in its purest form.

#### 4. *Hunter v. Regents*

Recently, in *Hunter v. Regents*, the United States Court of Appeals for the Ninth Circuit ruled that, at least in the instance of a university-operated laboratory school, there might be a compelling enough governmental interest at stake to justify racial admissions criteria.<sup>73</sup> The Corinne A. Seeds Elementary School is operated as a research laboratory at the University of California at Los Angeles (UCLA) Graduate School of Education and Information Studies and focuses particularly on issues relevant to children in multi-cultural urban settings. The school's admissions committee meets annually to determine what characteristics are needed in the student body to fulfill its research mission. The committee considers numerous factors in making admissions decisions, among them race, ethnicity and family income.

In examining this admissions policy, both the district court and the United States Court of Appeals for the Ninth Circuit invoked the test of strict scrutiny to determine whether the university had a sufficiently compelling interest at stake and if the admissions policy was narrowly tailored to serve that interest. The Ninth Circuit ruled that, indeed, California had a compelling interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools. Additionally, they ruled that the consideration of race and ethnicity in the admissions process was narrowly tailored to further that interest. In arriving at its decision in this case, the Ninth Circuit relied prominently on the testimony of expert witnesses, notably the researchers involved with the school. Circuit Judge Pregerson's assertion that "courts should defer to researchers' decisions about what they need for

their research” stands in stark contrast with the view expressed in Circuit Judge Beezer’s lengthy dissenting opinion in this case. The Ninth Circuit stands alone as the only federal circuit to uphold a race-sensitive *admissions* policy, either in public or higher education.

## 5. Race-Sensitive Transfers in Public Schools

### a. *Eisenberg v. Montgomery*

The United States Court of Appeals for the Fourth Circuit’s decision in *Eisenberg v. Montgomery County* established important precedent in the area of race-sensitive *transfer* policies. Jacob Eisenberg was a first-grader at Glen Haven Elementary School in Montgomery County, Maryland during the 1998-99 school year when he applied for and was refused a transfer to the Rosemary Hills Elementary School Math and Science Magnet Program. The transfer policy in Montgomery County allowed for consideration of several different factors in processing a transfer request, among them the stability of the sending and receiving schools, the availability of space, and the reason for the request. An additional consideration was race. On any given campus, racial groups were classified depending on whether they were over or under-represented and whether their numbers had been rising or declining at that campus. Students were not permitted to transfer from a campus where their ethnic group was under-represented, especially if it had been in decline. Likewise, students were not allowed to transfer into a campus where their race was already over-represented, particularly if it had been on the rise. The student body at Glen Haven, where Jacob was assigned, was only twenty-four percent white, compared to the countywide white population of fifty-three percent. Because whites were already under-represented at Glen Haven, Jacob was not allowed to transfer.

Jacob's family brought suit in federal court, claiming the Montgomery County policy violated his Fourteenth Amendment Right to Equal Protection.

The trial court sided with the Montgomery County School System, denying Jacob's request for injunctive relief. Jacob and his family appealed the district court's decision to the Fourth Circuit. Following their own precedent from *Tuttle*, the Fourth Circuit chose to examine the Montgomery County policy with strict scrutiny, seeking a compelling governmental interest and narrow tailoring. In October of 1999, the Fourth Circuit held that the Montgomery County policy, aimed at the promotion of student diversity, was not sufficiently narrowly tailored. The policy was no more than "racial balancing in a pure form, even at its inception."<sup>74</sup> The court ordered that the county officials admit Jacob to the Rosemary Hills Magnet Program.

b. *Brewer v. West Irondequoit Central School District*

The Fourth Circuit decision in *Eisenberg* seemed to be indicative of a growing judicial consensus that race-based policies in the interest of encouraging diversity in public schools are extremely difficult to defend. A recent decision in the United States Court of Appeals for the Second Circuit, however, introduced some uncertainty to this issue. Only months before the *Eisenberg* decision, the United States District Court for the Western District of New York struck down a race-sensitive policy that allowed inter-district transfers between the Rochester City schools and six surrounding suburban districts.<sup>75</sup> In the summer of 2000, however, the Second Circuit reversed the ruling of the district court and sent the case back for further deliberation, suggesting that racial balancing in some situations might pass the compelling state interest test.<sup>76</sup>

At issue in *Brewer v. West Irondequoit Central School District* was a policy allowing minority students to transfer from predominantly minority inner-city schools into participating predominately white suburban districts. Conversely, only non-minority students were allowed to transfer from the suburban into the inner-city schools. The purpose of the program, which originated in the mid-1960s, was to reduce minority group isolation in the schools of Rochester and throughout Monroe County. Jessica Haak, a fourth grader in Rochester, applied for a transfer from her school to the Iroquois Elementary School in the Irondequoit District, a neighboring suburban district to Rochester. Haak's original transfer request was granted, but later, an administrator at Iroquois became suspicious that she was a non-minority student. A subsequent check of records confirmed the suspicion, and Jessica's transfer was revoked. Haak's family filed suit, alleging the revoking of the transfer constituted a denial of Jessica's Fourteenth Amendment rights.

The Second Circuit held that the reduction of racial isolation was a compelling enough governmental interest to justify the use of race as just one of the many factors considered when processing a prospective student's application. Circuit Judge Straub cited the reduction of racial isolation as an important factor in "preparing students to function in adult society, in which they will encounter and interact with people from many different backgrounds," and "making students more tolerant and understanding of others throughout their lives."<sup>77</sup> The circuit opinion challenges the assertion of the district court, as well as that of the Fifth Circuit in *Hopwood*, that there can be no compelling governmental reason for the non-remedial use of race-based classifications.

Citing *Bakke*, Circuit Judge Straub chastised the Fifth Circuit for being “the only circuit since *Bakke* to hold that a non-remedial state interest, such as diversity, may never justify race-based programs in the educational context.”<sup>78</sup>

The Second Circuit also cited its own precedent of *Parent Association of Andrew Jackson High School v. Ambach*, in which they established the notion that there is a compelling governmental interest in reducing *de facto* segregation.<sup>79</sup> Under the binding authority of the *Andrew Jackson* case and in the absence of what they considered a clear Supreme Court precedent, the Second Circuit vacated the district court’s ruling and remanded the case for a full trial on the merits.

## 6. Summary of Circuit Court Holdings

Review of these key cases indicates that there are still unresolved questions regarding the issue of race-sensitive policies in public schools or colleges. The courts are now in agreement with Justice Powell’s opinion in *Bakke* that all racial classifications must be examined with strict scrutiny. There is some disagreement, however, on whether diversity constitutes a compelling governmental purpose and, if so, how a policy might be sufficiently narrowly tailored to serve that purpose in the least restrictive manner. Table 2 provides an overview of the relevant cases and holdings of the courts.

### B. Judicial Themes and Concerns

#### 1. The Standard of Review

At the heart of the split on the *Bakke* Court was the disagreement over the standard of review that should properly be applied by the judiciary in affirmative action



Table 2: Circuit Court Holdings

Circuit	States	Relevant Cases	Holding
1st	ME, MA, NH, PR, RI	<i>Wessman v. Gittens</i>	Diversity may or may not be a compelling governmental interest. Admissions policy at Boston Latin School is not narrowly tailored and is ruled unconstitutional.
2nd	NY, VT, CT	<i>Brewer v. West Irondequoit Central School District, Parent Ass'n of Andrew Jackson High School v. Ambach</i>	Reduction of racial isolationism is a compelling governmental interest.
3rd	PA, NJ, DE, VI	None	None
4th	MD, NC, SC, VA, WV	<i>Eisenberg v. Montgomery County, Tuttle v. Arlington County</i>	Diversity may be a compelling governmental interest. Race-sensitive transfer and admissions policies not narrowly tailored and are ruled unconstitutional.
5th	TX, LA, MS	<i>Hopwood v. State of Texas</i>	Diversity is not a compelling governmental interest. Race-sensitive admissions policy at UT Law School ruled unconstitutional.
6th	MI, OH, KY, TN	None	None
7th	IL, IN, WI	None	None
8th	ND, SD, MN, NE, IA, MO, AR	None	None
9th	CA, OR, WA, AZ, MT, ID, NV, AK, HI	<i>Hunter v. Regents</i>	Government has a compelling interest in improving public schools. Race-sensitive admissions policy in research-based laboratory school is upheld.
10th	CO, KS, NM, OK, UT, WY	None	None
11th	AL, GA, FL	<i>Johnson v. Board of Regents</i>	Diversity may be a compelling interest, but UGA policy is not narrowly tailored and is ruled unconstitutional.

cases. Justice Powell chose the standard of strict scrutiny, meaning that the racial classifications must be justified by a compelling governmental purpose and that the policy must be narrowly tailored to achieve that purpose. The four-Justice block of Brennan, Blackmun, Marshall and White chose a less strenuous standard of review, one it labeled as “strict and searching,” but which demanded that racial classifications be justified by “important government objectives” and “substantially related to achievement of those objectives.” The disagreement over standard of review, however, has been clarified in subsequent Supreme Court decisions. *Wygant*, *Croson*, and *Adarand* added great power to Justice Powell’s proposition that all racial classifications demand strict scrutiny. Recent circuit court decisions dealing with race-sensitive admissions and transfer policies in higher and public education have since been uniform in the presumption that strict scrutiny was the proper standard of review. Because any race-based policy must be justified by a compelling governmental purpose and narrowly tailored to meet that purpose, it is vital to investigate how the courts have defined these concepts.

a. What Constitutes a Compelling State Purpose?

The first prong of the test of strict scrutiny is that the challenged policy must be justified by a compelling governmental purpose. But what constitutes a compelling governmental purpose, and how does it differ from the “important government objective” that Justice Brennan wrote about in *Bakke*? In the federal cases examined in this dissertation, a number of governmental purposes were asserted by school administrators to be compelling, with varying levels of success.

The interest most frequently offered as compelling in these cases is the idea of fostering student body diversity and gaining the educational benefits purported to flow from it. This argument was one of the four asserted by the University of California Davis in the *Bakke* case. Justice Powell's much-debated conclusion that student body diversity did indeed represent a compelling state purpose has ensured that such an argument would be made in each ensuing case related to school admissions or transfers. The First and Fourth Circuits have proceeded in educationally-related affirmative action cases by allowing Justice Powell's opinion related to student body diversity to stand as "good law," although their discussions of the concept indicate, to varying degrees, a healthy skepticism towards the continued validity of student body diversity as a compelling state purpose. The Eleventh Circuit has also proceeded, like the First and Fourth, under the assumption that diversity could be considered a compelling state purpose, offering this clarification: "The diversity interest that we assume may constitute a compelling interest does not view racial diversity as an end in itself, but rather as a means to achieve the larger goal of providing a superior education by creating a university community that resembles the broad mix of cultures, experiences, and ideas to be found in society."<sup>80</sup>

In the *Eisenberg* case from the Fourth Circuit, the Montgomery school system argued that their race-sensitive transfer policy was justified not only in the interest of promoting a diverse student body, but also in the interest of avoiding any potential segregation that might occur without such a policy. While the appeals court assumed (without deciding) that student body diversity may be a compelling state interest, they

gave no credence to the argument that such a policy was needed to avoid potential segregation, arguing that, in practicality, the two interests asserted were one in the same.

In contrast to the lukewarm endorsement of diversity in the First, Fourth, and Eleventh Circuits, the Second Circuit provides a much more ringing endorsement. In *Brewer v. West Irondequoit Central School District*, it upheld the argument that the “reduction of racial isolation” was a compelling state purpose to justify a race-sensitive inter-district transfer policy in and around the Rochester area. In the *Irondequoit* case, the district court relied heavily on the Fifth Circuit’s *Hopwood* decision in ruling that “the reduction of racial isolation” (fostering of diversity) was not sufficiently compelling to justify racial classifications. The Second Circuit, however, remanded the case to the district court, stating that reliance upon Fifth Circuit precedent was inappropriate and conflicted with both Supreme Court and Second Circuit precedent.

While Justice Powell’s assertion that student body diversity is a compelling state interest has not gained great support among the various circuits, only the Fifth Circuit has been so bold as to declare it “bad law.” Though *Hopwood* was a sweeping decision rendering race-sensitive admissions in the Fifth Circuit illegal, the declaration that *Bakke* was no longer good law was strongly challenged in a concurring opinion filed by Fifth Circuit Judge Wiener: “If *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement...Until further clarification issues from the Supreme Court defining ‘compelling interest’ (or telling us how to know one when we see one), I perceive no ‘compelling’ reason to rush in where the Supreme Court fears – or at least declines – to tread.”<sup>81</sup> Until such a time that the

Supreme Court should revisit the issue, it remains safe to assume that, except for the areas encompassed by the Fifth Circuit, student body diversity remains a compelling enough state purpose to justify a race-sensitive admissions or transfer policy.

Another argument frequently submitted for consideration as a compelling state purpose justifying race-sensitive policies is the need to alleviate the effects of prior discrimination. The University of California Davis made the argument in the *Bakke* case that their special admissions program was necessary in order to remedy the vestiges of prior societal discrimination. Justice Powell was not convinced that this constituted a compelling state purpose. The concept of societal discrimination, in his view, was far too vague a concept to justify the use of a racial classification. Had there been evidence of specific acts of discrimination on the part of the university, race-based remedial programs would have been justified. Justice Powell, however, found no such evidence in the record.

In *Hopwood*, the University of Texas Law School made the argument that its affirmative action admissions policy was necessary to ameliorate the lingering effects of past discrimination within the Texas educational system. The Fifth Circuit rejected the argument, pointing out that many of the beneficiaries of the program were not even from the State of Texas. In order for such an argument to pass constitutional muster, the Fifth Circuit held, “the State of Texas, through its legislature, would have to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the ‘plus’ given to applicants to remedy that harm.”<sup>82</sup>

The Boston Latin School attempted to justify its race-sensitive admissions policy by arguing that it was necessary to redress the vestiges of past discrimination. Though public schools in Boston had a long and well-documented history of discriminatory conduct, that history alone was not, in the view of the First Circuit, sufficient to justify the policy. In addition to showing that there had been prior discriminatory conduct, the First Circuit suggested, the Boston schools needed to show, by “strong basis of evidence,” that a “current social ill in fact has been caused by such conduct.”<sup>83</sup> The school’s arguments revolved around a reported achievement gap between minority and non-minority students. Although they presented social science evidence supporting that such a gap indeed existed, the court was unmoved, arguing that there was no convincing evidence that the gap was the result of past discrimination.

In general, the argument that the government has a compelling interest in remedying the lingering effects of past discrimination has met with limited success. It is important to note, however, that all courts are in agreement that the state has a compelling interest in remedying the effects of its own discrimination. Such remedies, however, must be in response to specific discriminatory conduct that can be shown to have caused some constitutional harm and be designed to specifically address that harm. Vague concepts such as societal discrimination have not been able to pass the compelling interest test.

The encouragement of student body diversity and remediation of prior discrimination are the most common rationales provided by schools to justify affirmative action admissions or transfer policies. However, several other arguments have been

made, mostly without success. In the *Bakke* case, the University of California Davis argued that their special admissions program was necessary to increase minority representation in the medical field as well as to improve the delivery of the health care system in underserved communities. Justice Powell (the only Justice in the case to apply the compelling interest test) rejected the first of these arguments as a quota. He did, however, concede that there may be a legitimate state interest in improving the delivery of health care in underserved (minority) communities, but there was little reason to believe that the Davis special admissions program was designed to do so.

The University of Texas Law School argued in *Hopwood* that their admissions policy, in addition to promoting diversity and correcting past discrimination, was necessary to combat a perceived hostile environment against minorities and to improve the poor reputation of the law school among minority communities. Neither of these arguments, in the view of the Fifth Circuit, approached the level of governmental importance necessary to pass the test of compelling interest.

A case that stands out from the others with regard to the compelling interest test is *Hunter v. Board of Regents* from the Ninth Circuit. This case, which involved a challenge to a race-based admissions policy at an elementary school operated by the Graduate School of Education and Information Studies at the University of California at Los Angeles, offered a twist to the compelling interest question that may hold particular relevance for some charter schools. Unlike other cases, the UCLA Graduate School did not offer student diversity or redressing the effects of past discrimination as justification for their policy. Instead, they asserted that the State of California had a compelling

interest in operating a research-based school dedicated to improving the quality of education in urban public schools. Because public schools in urban areas tend to have certain demographics, they argued, any research-based school designed to address educational challenges endemic to urban schools should serve similar demographics. The Ninth Circuit held that such a purpose was sufficiently compelling to justify racial criteria in the admissions policy. This case may be significant for research-based charter schools that are affiliated with public universities, but these are very few in number.

In summary, there continues to be much confusion about what constitutes a state purpose compelling enough to justify racial classifications in school admissions or transfer policies. Justice Powell's assertion that diversity represents a compelling state interest still stands, albeit on shaky ground, as good law.<sup>84</sup> The state has a compelling interest in remedying constitutional harm that they have caused through prior acts of discrimination. That interest does not extend, however, to redressing the effects of past societal discrimination and, in none of the cases discussed, has the state been able to show to the court's satisfaction that their past discrimination had any causal connection upon the "societal ill" they sought to correct through their policy. Of the other justifications offered in the various cases, only one has emerged as a possible compelling state purpose that might be used by charter school administrators to justify a race-based admissions policy – the interest of the government in operating research-based schools designed to improve the quality of education in certain areas where there is a demonstrated need for improvement.



b. What is Narrow Tailoring?

The second and more difficult test of strict scrutiny involves the concept of narrow tailoring. Assuming that a race-sensitive admissions or transfer policy is justified by a compelling purpose, it must be designed in such a way that it is the least restrictive manner in which the government could achieve the stated goal. The purpose of the narrow tailoring analysis is to make certain that the policy undertaken by the state actor meshes so closely with the “compelling” goal that there is little or no possibility that a malicious motive is behind the policy.

Though Justice Powell found the special admissions program at the University of California Davis to be justified by the compelling state interest of student body diversity, he subsequently threw it out on the basis that it was not narrowly tailored to serve that compelling purpose. In turn, many of the Federal Circuit cases in which courts have deferred to Justice Powell on the question of what constitutes a compelling state purpose have proceeded to throw out race-based policies based on the conclusion that they were not narrowly tailored. It would seem that, as long as *Bakke* remains good law, the chances of a race-based admissions policy surviving a constitutional challenge depend upon whether or not that policy can be deemed sufficiently narrowly tailored. What exactly constitutes narrow tailoring in an affirmative action admissions program is a perplexing question, however, and one deserving of discussion.

In his brief discussion of narrow tailoring in *Bakke*, Justice Powell focused on two basic criticisms of the Davis special admissions program. First, the program considered only racial or ethnic diversity and discounted other, equally compelling forms of

diversity: “The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element,” Justice Powell theorized. “Petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.”<sup>85</sup> A second troubling aspect of the Davis plan for Justice Powell was the fact that it involved the set-aside of a specified number of seats to be available only to members of minority groups. This type of program, Justice Powell suggested, served to totally exclude prospective students from participation based upon their race and insulate “applicants with certain desired qualifications from competition with all other applicants.”<sup>86</sup>

Justice Powell cited the admissions program at Harvard College as an “illuminating example” of how universities may go about achieving the educational diversity “valued by the First Amendment” without using predetermined quotas. The Harvard policy had expanded the definition of diversity to include not only racial and ethnic factors, but also economic background, geographic origin, and other cultural or personal characteristics that a student may bring to the mix. Quoting from the Harvard policy, Justice Powell found it noteworthy that race might be one of several factors that might weigh in favor of a certain candidate, but not one that isolated a student from competition with other qualified candidates or guaranteed that student a slot as a part of a rigid set-aside or quota: “In practice, this new definition of diversity has meant that race has been a factor in some admissions decisions. When the Committee on Admissions reviews the large middle group of applicants who are ‘admissible’ and deemed capable of

doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer..."<sup>87</sup>

An important feature of the Harvard program that Justice Powell viewed as absent from the Davis policy was the individualized consideration given to the qualitative aspects of student applications. Such consideration makes it much more likely that true educational diversity will be approached than when a student is mechanically awarded a preference based upon his or her race. For example, an African-American student may actually lose out to another applicant (regardless of race), if that applicant seems to possess personal attributes deemed more likely to promote educational diversity. Such attributes, Justice Powell noted, might include "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important."<sup>88</sup> Under such a program, Powell suggested, a student who loses out to another could make no constitutional complaint. That student's qualifications would have been weighed "fairly and competitively" with all other candidates and his or her "combined qualifications" would have been deemed inferior to those who gained admission.<sup>89</sup>

The Fourth Circuit, in *Tuttle*, provided a glimpse of just how a narrow tailoring test in an educational setting might be conducted. The court drew upon *United States v.*

*Paradise*, a Supreme Court decision from the employment arena which outlined four factors to consider and evaluate in a test of narrow tailoring: the necessity, flexibility and duration of the proposed relief; the potential effectiveness of any alternative remedies; the relationship of the goals to the relevant market; and the impact of the relief on the rights of those burdened by the policy.<sup>90</sup> The Fourth Circuit modified these four “*Paradise*” factors to apply more directly to an educational case such as *Tuttle*. In determining whether the admissions policy at issue in *Tuttle* was narrowly tailored, the Fourth Circuit asked the following questions: First, were there any race-neutral policy alternatives that could effectively accomplish the stated goal of diversity? Second, what was the planned duration of the policy? Third, what was the relationship between the numerical goal and the percentage of minority group members in the relevant work force? Fourth, was the policy flexible and was there a provision for waivers if goals could not be met? Fifth, how significant was the burden of the policy that was born by innocent third parties?<sup>91</sup>

In addressing these five points, the Fourth Circuit concluded that the policy at issue in *Tuttle* was not narrowly tailored to accomplish the goal of diversity. First, the Arlington School Committee that recommended the challenged policy had also recommended “one or more race-neutral alternatives.” This, in and of itself, demonstrated to the Fourth Circuit that there were effective race-neutral alternatives to achieve diversity. With regard to the duration of the policy, the court objected to the fact that the policy had been placed in effect not just for the 1999-2000 school year, but indefinitely thereafter. In order to pass constitutional muster, such policies must have a “logical stopping point,” the court argued. The third question, related to the relationship

between the goals and the percentage of minorities in the relevant “work force,” was particularly troubling to the Fourth Circuit. Arlington School officials had a stated goal of achieving campus populations that “approximate the distribution of students from groups in the district’s overall student population.”<sup>92</sup> This type of goal, the Fourth Circuit explained, is nothing more than illegal racial balancing. Even though there was no quota, *per se*, the use of the weighted lottery in the admissions procedure effectively skewed the odds in favor of certain minorities. The flexibility of the program was also an issue for the Fourth Circuit in *Tuttle*. Based on the ethnic distribution of the available applicant pool, a prospective student’s chances of being selected by lot were adjusted depending on his or her race. This, in the view of the court, constituted a mechanical and inflexible use of race and was completely contrary to Justice Powell’s direction in *Bakke* that such policies treat students as individuals, not groups. Finally, the Fourth Circuit considered the effect of the policy on third parties who, in this case, were kindergarteners: “We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups.”<sup>93</sup> Unlike Justice Powell’s opinion in *Bakke*, the Fourth Circuit, in striking down the race-sensitive admissions policy in *Tuttle* (and later the transfer policy in *Eisenberg*), offers no discussion of “illuminating examples” of other similar programs that might be narrowly tailored.

Perhaps the most edifying discussion of the principal of narrow tailoring as it applies to school admissions policies is offered in the Eleventh Circuit’s opinion in *Johnson v. Board of Regents*. In this case, Circuit Judge Marcus took the four “*Paradise*”

factors, already modified to an educational setting by the Fourth Circuit, and modified them even further to assist in judging whether the University of Georgia's race-sensitive admissions policy aimed at fostering student diversity was sufficiently narrowly tailored to serve that compelling interest: First, does the policy use race in a "rigid or mechanical" way that does not sufficiently consider the different types of contributions to diversity that individuals might make? Second, does the policy take full and adequate account of factors unrelated to race that may contribute to educational diversity? Third, does the policy benefit or harm a certain racial group in an arbitrary or disproportionate way? Fourth, has the school "genuinely" considered and rejected race-neutral policy alternatives?

Analyzing UGA's policy in light of these four questions, the court concluded that it was not tailored to serve the stated goal of fostering educational diversity. At the TSI (second) stage of the admissions process, non-white candidates were "mechanically" awarded a half-point bonus, regardless of whether the individual candidate actually had personal characteristics (other than skin color) that would have contributed to the diversity on campus. The fact that the policy afforded no method of adjusting the bonus based upon an individual applicant's profile constituted rigidity in the eyes of the court. Further, the policy did not adequately consider how different candidates might individually contribute to the campus diversity. For example, a white candidate from Athens, Greece, might make a significantly greater contribution to meaningful diversity than would a non-white candidate from Athens, Georgia, where the university is located. Similarly, a non-white candidate from an upper middle class suburb in Atlanta might not

contribute to diversity as much as a white applicant from “a disadvantaged rural area in Appalachia.” The level of consideration given to race-neutral personal characteristics at the TSI stage was not adequate in the court’s view, and as Circuit Judge Marcus pointed out, “individuals who come from economically disadvantaged homes; individuals who have lived or traveled widely abroad; individuals from remote or rural areas; individuals who speak foreign languages; individuals with unique communications skills (such as an ability to read Braille or communicate with the deaf); and individuals who have overcome personal adversity or social hardship - none of the characteristics that make these kinds of individuals ‘diverse’ are taken into account at the TSI stage.”<sup>94</sup>

Although the UGA policy did take into consideration an applicant’s extra-curricular and work activities, it did so only in terms of hours spent working with no consideration of the nature or purpose of that work. This approach ignored the most important question in this case related to extra-curricular or work experience – how might it make a student more likely to contribute to campus diversity in a meaningful way? The court’s suggestion was that a person who had worked or volunteered in a challenging and diverse environment, such as in an impoverished area or a third world country, might, by virtue of that experience, bring greater diversity to the campus than a person who had mowed lawns in Athens, Georgia during the summers. This concentration on quantity rather than quality of work and extra-curricular experience was yet another flaw in the tailoring of UGA’s policy.

The university attempted to explain its reliance upon a mechanical formula with the fact that the sheer numbers of applications that they must consider each year are so

overwhelming. The university president acknowledged a difference between the UGA methodology and that of smaller institutions and guessed that every other institution in the State of Georgia could probably effectively read and evaluate each application qualitatively. UGA only attempted this in the “edge read” (third) stage, after some applications had already been accepted or rejected with consideration being given to race. The court answered the university’s claim with the rejoinder that “if UGA wants to ensure diversity through its admissions decisions, and wants race to be part of that calculus, then it must be prepared to shoulder the burden of fully and fairly analyzing applicants as individuals and not merely as members of groups when deciding their likely contribution to student body diversity.”<sup>95</sup>

The arbitrary nature of the bonus awarded to candidates based on race was also troubling to the court: “If a university cannot articulate a basis for the amount of the numerical bonus it awards non-white candidates,” the court declared, “then it has no right to award such a bonus, or to implement an admissions policy that uses such a bonus as a substitute for reading and evaluating each individual’s application to assess her potential contribution to diversity.”<sup>96</sup> The court relied on the testimony of UGA admissions director Nancy McDuff, who conceded that the half-point bonus awarded to non-white candidates was derived “out of the blue,” representing nothing more than a guess as to the appropriate weight that race should carry in the admissions process. The lack of statistical basis for adding a half-point bonus for race pointed clearly, at least in the estimation of the court, to the conclusion that the benefit was an arbitrary one.



Not only did the Eleventh Circuit judges deem the half-point bonus to be arbitrary, but they also viewed it as disproportionate in relation to the points awarded to the limited other diversity-related attributes considered at the TSI stage, not to mention the numerous attributes that the court felt the policy should have, but did not consider. Only a prospective student's SAT or ACT scores could potentially have carried more weight than race in the equation. The university contended that, because eighty percent of each entering freshman class was accepted during the (race-neutral) first stage of admissions, the number of students adversely impacted by the consideration of race at the TSI stage was relatively inconsequential. Furthermore, that impact was more than balanced by the bonus afforded to siblings and children of alumni, whom the university claimed were overwhelmingly white.<sup>97</sup> The court turned a deaf ear to all of the university's arguments. The university's worries over the impact of the policy on *groups*, the court suggested, would be more appropriately focused on the impact the policy was having on *individuals*.

Finally, the Eleventh Circuit scolded the university for its failure to consider any race-neutral alternatives to the challenged policy. "It is beyond dispute that there are race-neutral measures that potentially may advance the goal of creating a diverse student body," asserted Circuit Judge Marcus, "Recruiting, advertising, financial incentives to admittees from less advantaged homes, and other outreach strategies all may play an important role in ensuring that the qualified applicant pool contains individuals from a wide variety of backgrounds."<sup>98</sup> The university, however, did not produce the required evidence that they had given "meaningful consideration" to race-neutral policies of any

type. Nor did they produce any evidence suggesting that such measures would be ineffective in the pursuit of their compelling state purpose of fostering educational diversity.

In sum, the University of Georgia admissions policy failed to pass the test of narrow tailoring. In fact, the policy could not satisfy the court's concerns regarding any of the criteria of the modified "*Paradise*" test created by the Eleventh Circuit. The mechanical use of an arbitrary bonus awarded on the basis of race, the failure to adequately consider individually a candidate's potential contribution to campus diversity (including those race-neutral characteristics that contribute to it), and the disproportionate impact on those burdened disqualified this particular policy from being viewed as sufficiently narrowly tailored.

In truth, the university made "little serious effort to defend their policy under *Paradise* or any other narrow tailoring test."<sup>99</sup> They instead sought to defend the plan by linking it with the Harvard plan favored by Justice Powell in his *Bakke* opinion. This strategy proved to be a mistake as the Eleventh Circuit viewed the UGA policy as very different from the Harvard policy. While the Georgia plan required awarding an arbitrary half-point bonus to all non-white applicants, the Harvard plan allowed admissions officers to take a much broader array of characteristics related to diversity into consideration. The mechanical approach at UGA was not nearly as likely, in the opinion of the court, to fully and fairly assess each individual's potential contribution to the climate of educational diversity sought by administrators.

The Eleventh Circuit left no doubt as to why the freshman admissions policy at the University of Georgia was not narrowly tailored. Understanding why certain policies have failed the test of narrow tailoring, we may look at the Second Circuit case *Brewer v. West Irondequoit Central School District* to find a policy that was deemed sufficiently narrowly tailored. This case dealt with a race-sensitive inter-district transfer policy, which allowed students in the Rochester school system (predominately minority) to move to suburban schools that were predominately white. The court found that the asserted purpose of the program, to reduce racial isolation among students, was indeed a compelling governmental interest. The Second Circuit, however, approached the issue of narrow tailoring a bit differently than some of the other courts. Though it did use the general guidelines established by the Court in *Paradise*, it considered these types of questions to be more appropriately addressed in the trial court. However, the record developed at the preliminary injunction state, Circuit Judge Minor asserted, showed little likelihood of success for the plaintiffs with regard to demonstrating that the policy was not narrowly tailored.

First, it was clear to the court that the race-neutral measures that had been in use over the previous thirty years had been ineffective at accomplishing the goal of reducing or preventing racial isolation. According to the record, the Rochester schools had experienced a troubling demographic shift from a minority population of thirty-three percent in 1966 to eighty percent in 1997. The challenged policy allowed minority students to transfer from primarily minority Rochester schools to predominately non-minority schools in the outlying suburban area. It also allowed non-minority suburban

students to transfer into Rochester schools. If the transfer program were to serve as a way to integrate the urban and suburban schools, the court concluded, then the racial limits on transfers would seem wholly necessary. The second issue considered by the court was the duration and flexibility of the policy, about which it found no evidence in the record. In Circuit Judge Minor's opinion, the administrative procedures of the policy in general or the manner in which it was evaluated and renewed were subjects most appropriately discussed in the trial court. Finally, the court considered the impact of the policy on innocent third parties. Because there was no evidence that those who were refused transfers on the basis of race would be given educational services that were in any way inferior, the court viewed the negative impact as minimal. Further, a student who was denied a transfer request to a school in another district could still attend the school of his or her choice if the student were willing to pay the out-of-district tuition. The transfer program allowed students to attend out-of-district schools tuition-free, but no student would be denied admission based on race if the student was willing to pay that tuition.

The concept of narrow tailoring in other cases is not well developed. Though the First Circuit, in *Wessman*, does allow that diversity within a student body may serve a compelling governmental interest, it objected to the concept of diversity as defined by the Boston School Committee. It may be argued that, in declaring the committee's version of diversity to be inadequate, the First Circuit was, in essence, pointing out a flaw in the tailoring of the policy. The Fifth Circuit, in *Hopwood*, never reaches the question of narrow tailoring because the University of Texas Law School policy did not pass the

compelling purpose prong of the strict scrutiny test. There are, however, illuminating points with regard to narrow tailoring to be found in Circuit Judge Wiener's concurring opinion in *Hopwood*.

Circuit Judge Wiener disagreed with the majority holding that diversity could never be a compelling governmental interest. He assumed the continued validity of Powell's opinion and applied the standard of narrow tailoring to strike down the UT policy. In Judge Wiener's opinion, the UT policy failed to meet the test of narrow tailoring because of its specific focus on increasing the percentages of African-Americans and Hispanics in the entering classes. This type of policy essentially is a quota system and inconsistent with Justice Powell's understanding of educational diversity. Though the policy might increase the number of black and brown faces at the UT Law School, he asserted, "facial diversity is not true diversity, and a system thus conceived and implemented simply is not narrowly tailored to achieve diversity."<sup>100</sup>

The Ninth Circuit, in *Hunter v. Regents*, determined that a race-based admissions policy at a university-run elementary school was narrowly tailored to achieve the compelling purpose of conducting research aimed at improving the quality of urban public education. In doing so, the court gave great deference to the expert testimony provided by researchers at UCLA. Dr. Carollee Howes testified at trial that if one is seeking "a sample with some particular distribution of race, you use race as the variable..."<sup>101</sup> Admission by random selection, she testified, would not result in the desired racial distribution, particularly with the small sample size.

Circuit Judge Beezer offered a dissenting opinion in *Hunter* in which he concluded that the stated purpose of furthering research related to improving urban public education was not sufficiently compelling to justify the race-sensitive admissions program. Although this finding rendered the narrow tailoring test unnecessary, Judge Beezer proceeded to briefly discuss his view of what would have constituted narrow tailoring. First, he claimed, there was not an exact match between the “justification and the classification.” In other words, he questioned the assumption that a student’s learning style was somehow related to his or her race or ethnicity. None of the evidence presented, he argued, established the “existence of any ineluctable connection between any particular race/ethnicity and any particular ‘learning style.’”<sup>102</sup> A second issue was the university’s failure to meaningfully consider race-neutral alternatives to the challenged policy. A third troubling aspect was the “over inclusive” nature of the policy. In particular, the university’s inclusion of preferences for mixed-race students befuddled Circuit Judge Beezer. If the purpose of the research was to study the relationship between particular races and learning styles, the inclusion of this “puzzling category,” was a red flag indicating the policy was not narrowly tailored.

In summary, the question of what constitutes a narrowly tailored race-sensitive policy has not been definitively answered. We know that, of all the circuit decisions, only the race-sensitive admissions policy at Corinne A. Seeds University Elementary School at UCLA has passed the test of narrow tailoring, and the unique nature of this case limits its usefulness for those attempting to narrowly tailor a policy designed to foster diversity. The most elucidating discussions regarding what exactly constitutes

narrow tailoring have come from those cases in which the challenged policy did not meet the test of narrow tailoring. It can, therefore, be reasonably concluded that the legal hurdle a race-sensitive admissions policy must clear is a substantial one.

When the asserted state interest is the promotion of a diverse student body (as it has been in most cases), policymakers seeking to narrowly tailor their policies should include in their design, according to the majority of the case law, a concept of diversity that goes beyond race and ethnicity; the ability to take into consideration the potential contributions of each applicant; no mechanical, arbitrary, or disproportionate use of race; and a genuine and thorough consideration of race-neutral alternatives. These considerations seem to be the general yardstick used by the judiciary in measuring whether a policy is narrowly tailored toward the achievement of a compelling governmental goal.

## 2. Higher Education v. Public Education: Academic Freedom and Value Inculcation

Of the six cases discussed dealing with race-sensitive admissions policies, three involve higher education and three involve public education, and two additional public education cases involve race-sensitive transfer policies. On the surface, the judicial treatment of these cases seems to be largely the same – they have all utilized the test of strict scrutiny, seeking a compelling state purpose and narrow tailoring. There seems to be no particular pattern indicating that race-sensitive policies are either more or less justifiable depending upon the educational setting. Nevertheless, one must consider whether the differences inherent in these two educational settings could impact judicial reasoning.

The purposes of higher education differ from those of public elementary and secondary education; further, there are obvious age differences among the students involved. Do these contrasts make a difference in the way the courts may view a race-sensitive policy? One might suggest, perhaps, that the important socialization aspects of elementary and secondary public schooling might justify greater restriction of a student's constitutional rights, making a racial classification easier to defend. The Supreme Court has repeatedly reinforced the interest of the public schools in the inculcation of values. Schools, the Court has reasoned, impart "those shared values through which social order and stability are maintained"<sup>103</sup> and inculcate the "values necessary to the maintenance of a democratic political system."<sup>104</sup> This civic function of public education might suggest that a governmental goal such as student body diversity is of even greater importance with public school children than with college or graduate school students. Conversely, it may also be argued that university and graduate school faculty and students enjoy certain liberties that do not extend to those in public schools, which might in turn allow them to more easily defend the use of racial classifications in admissions.

In reviewing this issue, one must re-visit *Bakke*, unquestionably the seminal Supreme Court case dealing with affirmative action admissions programs. This case, which involved a challenge to the special admissions program of the University of California Davis Medical School, gives an indication of how cases in higher education may differ from those in public education. The university asserted four justifications for its special admissions program, two of which were ultimately rejected by Justice Powell.



The remaining two arguments are worthy of note when considering the differences between public and higher education and their potential impact on judicial reasoning.

First, the university argued that the State had a compelling purpose in improving the delivery of health care in underserved communities. While he could not find evidence suggesting that the Davis special admissions program was designed to achieve that particular goal, Justice Powell acknowledged that this was, indeed, a compelling state purpose. This suggests that there may be some limited number of compelling purposes that could be asserted by graduate institutions, if their policies were narrowly tailored to serve that purpose. A law school, for example, could conceivably assert a compelling purpose of improving legal services for persons in underserved communities. Additionally, a graduate school of education might assert a purpose of improving the quality of schools in highly minority, urban settings. These types of justifications, however, seem to be arguments that could only be made in the context of higher education.<sup>105</sup>

A second justification found to be compelling by Justice Powell was the concept that the special admissions policy was designed to foster student body diversity. As discussed previously, the assertion that student body diversity is a compelling state goal remains at the very center of the continuing judicial controversy. This argument, or some form of it, has been made in almost every subsequent case dealing with race-based admissions or transfer policies, whether in the context of higher education or public education. The concept of promoting student diversity was extremely compelling to Justice Powell because he viewed it as an essential component of academic freedom.

Though not specifically enumerated as a right in the Constitution, Justice Powell explained that the Court has historically viewed the construct of academic freedom as protected under the guarantee of the First Amendment. Importantly, academic freedom has traditionally been viewed as a concern of higher education. There is nothing in Justice Powell's opinion indicating that such a constitutional claim could be made at the elementary or secondary level.

Justice Powell cited two Supreme Court cases, both dealing with higher education, to support his view of academic freedom as a First Amendment concern.<sup>106</sup> He mentioned that, in *Sweezy v. New Hampshire*, Justice Felix Frankfurter outlined what he called "the four essential freedoms of a university" as the rights to decide who teaches, what they teach, how they teach, and whom they teach. Justice Powell explained further that an "atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body."<sup>107</sup> It is clear that, in the view of Justice Powell at least, the university was asserting their right of academic freedom as protected by the First Amendment of the Constitution. What is not clear, however, is whether or not Justice Powell would have accorded the same right of academic freedom to a public elementary or secondary school.<sup>108</sup> Because of the nature of the "*Bakke* split," there is no further elucidation on the concept of academic freedom in the opinions of the other eight Justices. Justice Powell's conclusion that the promotion of student body diversity via narrowly tailored race-sensitive admissions policies is a legitimate exercise of a university's right to academic freedom (as provided by the First Amendment) stands in isolation.

In the two other higher education cases, one in the Fifth Circuit (*Hopwood*) and one in the Eleventh Circuit (*Johnson*), there is little illumination on whether the concept of academic freedom as a First Amendment right extends into the public secondary or elementary classroom. The Fifth Circuit, in *Hopwood*, dismissed Justice Powell's opinion as bad law, stating that it garnered only one vote – his own. This rejection of diversity as a compelling state purpose rendered any discussion of academic freedom a moot point. In a significant discussion of the difficulty of interpreting *Bakke* as precedent, Eleventh Circuit Judge Marcus expressed the same concerns that were expressed by the Fifth Circuit about the isolated nature of Justice Powell's opinion. The Eleventh Circuit assumed, without deciding, that the promotion of student body diversity at the University of Georgia might be a significantly compelling governmental purpose to justify its race-sensitive freshman admissions policy. Though it proceeded under the assumption that *Bakke* was still good law, the refusal of the Eleventh Circuit to take a definitive stance on the issue of student body diversity as a compelling state interest leaves legal scholars lacking any substantive guidance on the scope or application of academic freedom as a concern of the First Amendment.

Examination of the cases dealing with race-sensitive policies in the public school context provides minimal insight into how the contextual differences between higher and public education might impact judicial reasoning. Both the First Circuit in *Wessman* and the Fourth Circuit in *Tuttle* and *Eisenberg* proceeded under the assumption that *Bakke* is still good law; therefore, there is limited discussion in these cases related to student body diversity as a compelling state goal or how the courts' consideration of the issue might

differ depending upon the educational context. Accordingly, the concept of academic freedom, as described by Justice Powell in *Bakke*, is not a consideration. In these cases, race-sensitive policies were found to be constitutionally deficient in their design.

The Second Circuit offered some guidance on this particular issue, however, in *Brewer v. West Irondequoit Central School District*, a case involving a challenge to a race-sensitive inter-district transfer program between the city and suburban schools in and around Rochester, New York. Rather than offering the promotion of student body diversity as a justification for the program, the school district offered the related argument that the reduction of racial isolation was a compelling state goal. Although the “reduction of racial isolation” may seem to simply be another way of saying the “promotion of student body diversity,” there could be significant legal differences.

The “promotion of student body diversity,” as Justice Powell viewed it, is associated with a university’s academic freedom right via the First Amendment to decide who may be admitted to study. There is no legal precedent suggesting the elementary or secondary public schools enjoy those same rights of academic freedom. In the case of this inter-district transfer program in Rochester, however, the “reduction of racial isolation” represents a completely different interest: one that, in essence, invokes the Equal Protection Rights of those students who may be subject to such racial isolation. This argument is succinctly summed up by the United States Department of Justice *amicus curiae* filed on behalf of the school district, urging the reversal of the district court ruling in this case: “In the elementary and secondary school context, the importance of diversity in enrollments is not based on racial stereotypes or the belief that

students of one racial or ethnic background will bring any particular outlook to the classroom. Rather, it is based on the belief that exposing children at an early age to children of other races fosters social education and tolerance.”<sup>109</sup> In ruling that the policy was constitutional, circuit Judge Straub embraced the notion of protecting students from racially-isolated environments, championing diversity as a necessary component of public education, which, by its very purpose, must strive to prepare children to become functioning members in an adult society that is diverse. The teaching of understanding and tolerance, he concluded, were objectives at the core of our civic education and the promotion of these goals constituted a compelling state interest.

There is a second potential difference between the contexts of public and higher education exposed in review of the *Brewer* case. In applying the narrow tailoring analysis, the court considered the third party burden, or the harm of the policy on those adversely impacted by it. In this case, the policy at issue dealt with inter-district transfers – it allowed students to move, free of tuition, from the urban largely minority Rochester district to suburban schools that were predominately non-minority. The white student who was denied participation in this program as a result of the race-sensitive policy, the court argued, was not disproportionately impacted because she was still able to attend her own school, which by all indications was an effective school where she could attain a high level of education. Further, her rejection from the transfer program was not an outright denial of admission to the suburban school of her choice; it simply meant that she was not able to transfer into that school on a tuition-free basis.

This third party burden changes substantially in the context of higher education, where denial from a highly-selective college may have more serious ramifications in terms of a student's future prospects than the denial of a transfer request or even admission for an elementary or secondary public school. The University of Texas Law School, for example, is considered by many to be the top law school in Texas and surrounding states. Though there are numerous other quality law schools in the state, a student denied admission to the UT Law School because of a race-based policy would be unable to find another institution in the state with the prestige of the UT Law School. This type of reputation translates to more employment opportunities and greater income upon a student's graduation. Further, the student who is denied admission to the graduate school or college of his or her choice may have no other alternative available to him or her. A thirty-year-old Austin wife and mother who is rejected from UT Law based upon her race, for example, would either have to give up the notion of becoming a lawyer or relocate, with or without her family, to Houston, Dallas, or Lubbock to pursue her educational and professional dream. In contrast, if that same woman's daughter were denied admission to a charter elementary based upon her race, she could seek admission to other nearby charters, private schools, home school, or simply attend her neighborhood public school.

*Hunter v. Regents* is unique from any of our other featured cases in that it highlights a mixture of concerns relevant to both higher and public education. Although the case involved a challenge to a race-sensitive admissions policy at an elementary school, a public university ran the elementary school as a laboratory for educational

research. This is the only case in which student body diversity (or some closely-related concept) is not asserted as at least one of the state's interests justifying the race-based policy. Instead, the university argued, and the Ninth Circuit agreed, that it had a compelling interest in operating a research-oriented school designed to improve the quality of public education in urban public schools. This is an argument which is similar to that made by the University of California Davis Medical School, when they suggested that the policy was a means of improving the delivery of medical services to underserved communities. Justice Powell accepted that as a compelling state interest, but reasoned that the Davis policy was not designed to further that goal.

In *Hunter*, the Ninth Circuit upheld the university's interest in improving urban public education as sufficiently compelling to justify the use of race in admissions. The *Hunter* decision prompts the following question: Is the stated purpose of conducting research to improve urban public education compelling to the court because of the importance of public education to the greater good or is it because the conduct of such research is so closely related to the academic freedom of the university? While the exact reasoning behind the Ninth Circuit's decision is unclear, it is likely that the court considered both of these angles in reaching its ultimate conclusion.

On the surface it seems that no particular pattern emerges in these cases with regard to the educational context in which they are fought. Upon closer examination, however, it appears that the concept of academic freedom, which is so pivotal in Justice Powell's discussion in *Bakke*, seems to only be applicable in higher education cases. Because lower courts have generally avoided reaching a definitive conclusion on whether

or not diversity is a compelling state interest, we do not have a significant body of case law applying Justice Powell's discussion of academic freedom to the public education setting. With regard to the inculcative role of public education in our society, only the Second Circuit in *Brewer* and, to a lesser extent the Ninth Circuit in *Hunter*, have seemed to attach enough significance to this objective to justify race-sensitive admissions.

### 3. The Role of Social Science

Debate surrounding social science evidence in cases related to race and education can be traced back to *Brown v. Board of Education*. Though the Court in *Brown* found social science evidence convincing, there continues to be disagreement among legal scholars as to its appropriate role. As mentioned earlier, Justice Thomas has had harsh words for the Court's reliance on social science in *Brown*, suggesting that the evidence was questionable and should not substitute for constitutional principles in guiding the Court's decisions.<sup>110</sup> Two of the cases reviewed in this dissertation – *Wessman* from the First Circuit and *Hunter* from the Ninth Circuit – provide interesting contrasts in judicial approaches to the use of social science evidence.

In *Hunter v. Board of Regents*, the Ninth Circuit upheld a race-sensitive admissions policy at a research-based elementary school run by UCLA. As previously discussed in this section, the university asserted a compelling interest in conducting research designed to shed light upon the best educational practices in urban public schools. The Ninth Circuit agreed with this proposition and, in reaching their conclusion, placed great weight on the expert testimony given before the trial court. The district court heard testimony from the dean of the UCLA Graduate School of Education, a



Stanford University Ph.D. who had previously served as the Chair of the Department of Education at Dartmouth. He told the court about urban educational challenges such as differences in language proficiency, learning styles, and parental involvement levels. The court also considered testimony from the director of the UES elementary school, who testified at the trial court that “the dynamic interplay of research, dissemination, professional development, and the training of an ever-expanding cadre of researchers dedicated to finding the answers to the perplexing problems facing urban schools...makes UES a unique and powerful instrument in meeting the State’s fundamental obligations to the children of its cities.”<sup>111</sup>

The expert testimony from social scientists was not only convincing in the Ninth Circuit’s compelling interest test, but it also proved pivotal in the test of narrow tailoring. Dr. Carolee Howes, a researcher and author who earned her Ph.D. from Boston University and completed post-doctoral training at Harvard University, testified that a cardinal rule of sound research practice was that, in order to produce a sample that has a particular racial distribution, race must be a considered variable – no proxy variable would suffice. The dilemma of the researchers at the UES School was compounded by the fact that they had a relatively small sample size. Random selection, even from a sufficiently diverse applicant pool, would be highly unlikely to produce an ethnic distribution reflective of California’s urban school population. The court concluded, based largely on the testimony of Dr. Howes and other social scientists, that there were simply no other race-neutral alternatives to the UES admissions policy that would yield the desired results. The court stressed the importance of judicial deference to the work

of social science researchers, with Circuit Judge Pregerson suggesting that judicial “second guessing of legitimate academic decisions” should be avoided and that courts should “show great respect for the faculty’s professional judgment.”<sup>112</sup>

In contrast to the *Hunter* case, the First Circuit decision in *Wessman v. Gittens* took a diametrically opposed position regarding the role of social science evidence. This case involved the race-sensitive admissions policy at Boston Latin School, a highly selective public high school in Boston. The Boston School Committee made an argument that this policy was a necessary means of redressing the lingering effects of past discrimination. In considering this explanation, the circuit court invoked the language of *Croson*, looking for a “strong basis in evidence” to conclude that the current problem had, in fact, been caused by some past discriminatory conduct on the part of the Boston schools. The “centerpiece” of the committee’s argument was that, as a result of past discriminatory practices, there was a significant gap in achievement levels for African-American and Hispanic students. The committee presented statistical data substantiating the existence of the achievement gap, which they suggested was sufficient, in and of itself, to satisfy the “strong basis of evidence” requirement of the court. The court, however, viewed this evidence as unconvincing, because while it proved that a gap did exist, it failed to establish a “causal link between those discriminatory acts and the achievement gap.”<sup>113</sup> The court seemed to be focused on the concept of causation, suggesting that the achievement gap could have been caused by any number of other intervening variables. Instead of the deference shown to the expert witnesses in the Ninth Circuit, the First Circuit picked apart the methodology unrelentingly.

The Boston School Committee argued that the achievement gap, in part, was the result of low expectation of minority students by their teachers. Sociologist Dr. William Trent offered testimony in district court on this point, detailing a “climate survey” that he had conducted in the Kansas City schools in which he found a statistical correlation between the level of encouragement given to a student by his or her teacher and that student’s achievement. In attempting to generalize his results from Kansas City to Boston, Dr. Trent analyzed data relevant to the Boston achievement gap, statistics concerning teacher seniority, and anecdotal evidence related to teacher expectations collected from school administrators. This data, he concluded, revealed patterns that were similar to those he had found in his analysis of the Kansas City schools.

Dr. Trent’s methodology in analyzing the Boston data, however, met with harsh criticism from the court, which suggested that his data “was not of the quality necessary to satisfy the methodological rigors required by his discipline.”<sup>114</sup> Before launching into a stinging critique of Dr. Trent’s methodology, Circuit Judge Seyla asserted that “when scientists (including social scientists) testify in court, they must bring the same intellectual rigor to the task that is required of them in other professional settings.” Dr. Trent’s explanation that he had insufficient time to conduct a more thorough analysis of the Boston system was “unacceptable” in the view of the court. “His failure to obtain reliable data,” the court suggested, “disabled him from taking even the first step, for he could not validly establish whether Boston teachers’ attitudes in fact were discriminatory, let alone show that they caused (or even significantly contributed to) the achievement gap.”<sup>115</sup>

In attempting to establish that there were legitimate concerns about teacher attitudes regarding minority students, the Boston School Committee offered testimony from the superintendent and a deputy superintendent, both of whom relied heavily upon anecdotal evidence. The deputy superintendent testified not only about her observations as a school administrator, but also about observations she collected prior to her employment, when she spent three months visiting classrooms as part of a research project. During that project, she visited classrooms in numerous schools and reported to have witnessed various types of disparate treatment, such as teachers calling on minority pupils less frequently than others, reprimanding minority students more frequently than others, and failing to encourage higher order thinking on the part of minority students. The testimony regarding observations during her tenure as deputy superintendent was characterized by the court as “unrelievedly general.”<sup>116</sup> Her reliance on casual observation and general anecdotal evidence meant that, in the view of the court, she had failed to meet the obligation of an expert witness to testify with sufficient specificity regarding her methodology and data: “Without disparaging Ms. Jackson’s (the deputy superintendent) credentials, we reject the contention that her observations, as presented at trial, provide any justification for a conclusion that a statistically meaningful number of Boston school teachers have low expectations of minority students.”<sup>117</sup>

The superintendent also offered testimony regarding the concept of socialization, which the court viewed as broad, general, and ultimately unpersuasive. The superintendent testified that close to thirty percent of the faculty in the Boston School system had started their careers in the era of segregated schools. Having spent their

formative professional years teaching in a system that openly discriminated, he suggested, may have shaped the attitudes of these teachers in such a way that it still influences their interactions with and expectations of minority students. The court conceded that this might be a valid argument, but demanded “empirical evidence” to substantiate such a theory: “While the idea of ‘socialization’ may be intellectually elegant, courts must insist on seeing concrete evidence.”<sup>118</sup>

It seems that the court took issue primarily with what they viewed as the poor methodology used by the expert witnesses in *Wessman*. It might be that, had Dr. Trent simply replicated his Kansas City study in the Boston schools or if school administrators had testified with greater specificity regarding classroom observations, the circuit court would have placed greater weight on their testimony. Upon deeper examination, however, the court’s attack on the credibility of the expert witnesses seems to signal a general mistrust of social science evidence. The court showed a general disdain for observation as a form of data collection, dismissing “anecdotal evidence” as useless in terms of testimony. Observation, however, including the collection of what some might call “anecdotal evidence,” is a primary method of data collection in qualitative research, which is a method frequently used by educational researchers.

Even in the realm of quantitative research, the First Circuit seems intent on holding social science research designs to the same standard that they would experimental designs in the hard sciences, demanding that the research establish a “causal relationship” rather than a strong correlation between variables. This approach fails to take into account the essential differences between research in the social sciences and the

hard sciences. A chemist, for example, can conduct a scientific study in a controlled lab environment and eliminate the influence of all extraneous variables. If the chemist finds a positive relationship between dependent and independent variables, he or she is much more able to assert a causal relationship. This is generally not possible for an educational researcher who is forced to employ statistical methods to mitigate the intervening effects of variables over which he or she has no practical ability to control.

The outcome of these cases is significantly impacted by varying judicial attitudes with regard to social science evidence. The deferential approach of the Ninth Circuit in *Hunter v. Regents* virtually assured that the school would be successful in defending its race-sensitive policy. On the other hand, the scrutiny with which the First Circuit analyzed the social science evidence presented in *Wessman v. Gittens* meant that the school had an extremely high standard to meet in proving that low teacher expectations had contributed to the minority achievement gap in Boston. It would seem that only the most flawless social science data and design would have been convincing to the court in this case, and it is questionable as to whether even that would have sufficed.

### C. Chapter Summary

The shaky nature of the *Bakke* precedent has made it difficult for the Federal Circuit courts to reach agreement on the numerous questions posed by race-sensitive admissions policies. Generally speaking, all Federal Circuits have agreed to analyze such policies under the standard of strict scrutiny. There have been several justifications asserted by those who seek to effectuate race-sensitive policies, but the most common is the promotion of a diverse student body. The Fifth Circuit has rejected the argument that

diversity can be a compelling state interest and, in the process, rendered *Bakke* to be bad law within its jurisdiction. No other Federal Circuit has gone as far as the Fifth Circuit, however, and most courts that have dealt with the issue have simply assumed, without deciding, that diversity may serve a compelling governmental interest.

Assuming that diversity is a compelling purpose, how does one recognize the sufficiently narrowly tailored policy? Justice Powell offered a bit of guidance on this question in *Bakke*, and both the Fourth and Eleventh Circuits have added insight to the question. It is clear that in order to pass any test of narrow tailoring, a race-sensitive policy must be aimed at promoting a concept of diversity that encompasses more than race and ethnicity. If a policy uses race in isolation or in a way that can be considered mechanical or rigid, it is not narrowly tailored. A policy is not narrowly tailored if it does not take into consideration a wide range of race-neutral student characteristics and does not include an individual appraisal of each candidate's likely contributions to campus diversity. Finally, if a school has not genuinely considered race-neutral policy options prior to enacting a race-sensitive one, courts are unlikely to view the policy as narrowly tailored.

Other judicial themes and concerns that have emerged from the case law involve the role of social science and the differences between higher and public education. With regard to the courts' handling of these cases, it is unclear whether there is a significant difference between higher education and public education. The concept of academic freedom as a First Amendment concern, as Justice Powell described it in *Bakke*, might lead one to assume that race-sensitive policies are more easily defended in the context of

higher education. The role of diversity in teaching toleration, considered by many to be a central component of civic education, suggests that race-sensitive policies are also defensible in the context of public education. In terms of the social science question, it is clear that social science evidence has often played a significant role in cases related to schools and racial diversity. In the various cases, however, there have been contrasting approaches to social science evidence, with some courts deferring to social science researchers and others contesting social science evidence as less than scientific.



## CHAPTER IV

### EXISTING CHARTER SCHOOL POLICIES AND DIVERSITY

Though *Bakke* was decided almost twenty-five years ago, litigation surrounding affirmative action admissions policies in public schools is a fairly recent phenomenon. This can be explained primarily by the fact that public school students have traditionally attended the campus nearest to their home. With public school choice options increasing, however, the question of how to legally craft admissions policies that will protect schools from resegregation has taken on increased importance. A major piece of the choice movement, and the focus of this chapter, is the charter school. Chapter IV will be a state by state review of charter school legislation and the provisions regarding ethnic diversity that have been written into these laws. These policies will be discussed in light of the judicial concerns enumerated in Chapter III.

#### A. What is a Charter School?

The charter school movement is considered an outgrowth of the school choice movement, though it enjoys more widespread political support than school vouchers. A charter school is a public school that, by virtue of its charter status, is enabled to operate independently, enjoying greater freedom from state regulation than the traditional public school. State charter laws vary with regard to what entities may grant charters and who may apply for charters. Typically, local school boards and state boards of education are involved in the charter approval process. State universities are also frequently among the

bodies able to grant charters. A variety of groups, including parents, community leaders, public educators, and educational entrepreneurs may apply to establish a charter school. Once established, charter schools may be operated by the group applying for the charter or may be run by a private educational organization hired by the chartering group.

According to the Center for Educational Reform, there are three basic principles that guide the charter movement. The first of these concepts is autonomy. Advocates suggest that by freeing charter schools from the bureaucracy that typically plagues public schools, they will be enabled to freely advance innovative instruction, curriculum and assessment that will more appropriately meet the needs of their specific educational communities. This type of administrative autonomy, they argue, is an essential component of an effective school. A second concept behind the charter movement is choice, which charter schools offer in a variety of ways. Most simply, charter schools are schools of choice for the students who attend them. Many suggest that there is inevitably an environment more conducive to learning in schools that students have chosen to attend. Charter schools are also the result of choices made by groups who perceive an educational need in their communities and utilize the charter process as a means to address that need. Additionally, the charter school's existence is dependent upon choices made by elected school boards (local or state) or universities that are empowered to grant charter school status. The third concept upon which the charter movement is based is accountability. Charter advocates suggest that the traditional school is measured by how fully it complies with local and state mandates. Charter school accountability, on the other hand, is tied to educational and fiscal performance, and those that fail to make the

grade do not draw students and will eventually be closed. This concept of market accountability is a hallmark of the choice movement in general, and though charter advocates may insist that there is heightened accountability for charter schools, this is an area of great concern for many educational policy analysts.

Thirty-eight states plus the District of Columbia have enacted charter school legislation. It is not, however, within the scope of this research to evaluate the merit of charter schools or to detail the many intricacies of charter school legislation from state to state. Seventeen of the states with charter legislation include provisions aimed at some sort of racial balance in the charter school student population. The purpose of this research is to examine the specifics of charter legislation with regard to admissions and student body diversity.

## B. Court-Ordered Compliance

Several states have minimal statutory reference to the ethnic make-up of charter schools. Arkansas, for example, requires the petitioning group, the local board of education, and the state board of education to “carefully review the potential impact of an application for a charter school on the efforts of a school or district to comply with court orders and statutory obligations to create and maintain a unitary system of desegregated public schools.”<sup>119</sup> This approach is one that attaches any consideration of race to the remedial setting and is clearly within the bounds of the constitutional concerns of the courts. A problem inherent in this approach, however, is how compliance with this statutory provision will be enforced administratively and how effective such enforcement will be?

According to Randall Greenway, who serves as the Charter School Liaison for the Arkansas Department of Education (ADE), the process requires the school board of any school district that might potentially be affected by the establishment of a charter school to review the charter school's application and submit a written report to the ADE and the State Board of Education. The written report may include "concerns about affects of the proposed charter school on the efforts of the local district to comply with court-ordered desegregation efforts."<sup>120</sup> Additionally, charter school applicants are required to submit pre-enrollment data, including information regarding the race of pre-enrolled students as well as information about the public schools these students might otherwise attend, to the State Board and ADE for review. The State Board considers these numbers in light of the current demographics of the affected district and the projected change in demographics as a result of the charter school before making the decision of whether or not to grant a charter request.

This process resulted in the denial of the Academics Plus Charter School's application during both the 1999-2000 and the 2000-2001 review process. Academics Plus Charter School was to be situated in the Pulaski County Special School District, which is under the same desegregation order as the Little Rock School District. During the 1999-2000 review cycle, both the state board and the local district denied the application on the grounds that it would adversely affect the district's efforts to comply with the desegregation order. In 2000-2001, the local school district denied the application based upon those same grounds. The Academics Plus Charter group re-submitted their application a third time for the 2001-2002 school year and finally had

their charter granted. They currently operate as one of only two open-enrollment charter schools in the state. Although they are not technically a party to the Little Rock/Pulaski court order, they continue to be monitored for any potential impact on those districts. Interestingly, Greenway indicated that initial numbers show this charter school has created a small improvement in racial balances with regard to the court mandates. While this approach is effective where there are existing court orders, it does not address the issue of educational diversity in areas where court orders do not exist.

Despite this inherent gap in the approach, there are several states in addition to Arkansas that have chosen to enact similar legislation. Virginia also requires charter school petitioners to comply with existing court orders regarding desegregation. State law requires that all applications for charters include a description of the admissions process, which must comply with any existing court-ordered desegregation plans.<sup>121</sup> The Virginia law differs significantly from the Arkansas law, however, for it leaves out of the process any analysis of the *potential impact* on the ability of the surrounding districts to comply with court orders. The obvious criticism of this arrangement is that a focus only on current compliance without analysis of future impact may eventually lead to segregated charter schools and resegregated public schools.

Charter schools in Virginia may admit students by lot, or they may have a “tailored admission policy that meets the specific mission or focus of the public charter school.” Any such policy, however, must also conform with “all federal and state laws and regulations and constitutional provisions prohibiting discrimination.” The practical

effectiveness of the Virginia statute is hard to gauge. As of the fall of 2000, there was only one charter school in operation, serving approximately 30 students.<sup>122</sup>

Louisiana law also limits consideration of race to the remedial setting. It stipulates that all charter schools be compliant with pre-existing court-ordered desegregation plans in effect for the city or parish school system within which they operate.”<sup>123</sup> According to the Center for Education Reform, there are twenty-one charter schools in Louisiana, serving almost 4,000 students. Louisiana charter schools may craft selective admissions policies that are consistent with the school’s “role, scope, and mission.” As in Virginia, however, no policy may include race, ethnicity, or national origin as criteria upon which an admissions decision is made.<sup>124</sup>

Oklahoma, where approximately 1,500 students attend six charter schools, is another state that requires charter schools to comply with existing desegregation court orders, but their approach is somewhat different than that of Arkansas, Virginia, and Louisiana. Oklahoma charter schools are open to any student who resides in the attendance zone of a school or district that is under a court-ordered desegregation plan (or party to an agreement with the United States Department of Education Office for Civil Rights designed to mediate the effects of “alleged or proven” racial discrimination) unless the school district notifies the charter school that the admission of the student would violate the court order or agreement.<sup>125</sup> This policy is similar to the Arkansas plan in that it allows for local school district input regarding how charter school admissions might impact its ability to remain in compliance with a court order. Outside of the

remedial context, however, Oklahoma law explicitly forbids the consideration of race in the charter admissions process.

Oklahoma provides for “academic enterprise zones” which allow a charter school to limit enrollment to a specific geographic area if that area contains a concentration of economically-disadvantaged students (those on free or reduced lunch) of sixty percent or greater. This would allow a charter group to locate where there is a high concentration of low-income families and serve only the families in that area. Existing data regarding the correlation between race and socio-economic status would suggest that schools in “economic enterprise zones” would likely also be largely minority. Rather than increasing diversity in charter schools, the feature of the Oklahoma law would appear to exacerbate segregation. Even if such schools were not highly minority in student content, research shows that high concentrations of low-income students in a school would not be conducive to high educational outputs.

### C. Process-Oriented Legislation

Some states take a more active approach to the issue of charter school diversity, requiring charter applicants to focus on the process and policies they will utilize to achieve a desired level of racial/ethnic diversity. California, which has over 300 charter schools serving more than 120,000 students, requires that any person or group seeking to start a charter school must include in their application “the means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted.”<sup>126</sup> Article I, Section 31 of the California Constitution, also

known as Proposition 209, bans affirmative action policies, so charter schools must comply with the law without the use of racial set-asides or quotas. The charter legislation in Florida mirrors the California law, stipulating that all the “major issues involving the operation of a charter school be considered in advance and written into the charter,” including “the ways by which the school will achieve a racial/ethnic balance reflective of the community it serves or within the racial/ethnic range of other public schools in the same district.”<sup>127</sup> Like California and Florida, Wisconsin also requires that the petition for a charter specify “the means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the school district population.”<sup>128</sup>

#### D. Results-Oriented Legislation

While California, Florida, and Wisconsin require charter school applicants to specify upfront how they will achieve a racial mix representative of the area they propose to serve, other states address the issue differently – not requiring charter schools to explain the means by which they will achieve diversity, but simply requiring them to be diverse. Kansas, for example, requires that the student population at a charter school must be “reasonably reflective of the racial and socio-economic composition of the school district as a whole” in order for the charter “establishment or continuation.”<sup>129</sup> A concern regarding the Kansas law is that an individual or group applying for a charter will not likely be able to provide any student demographic information other than projections. It seems, therefore, that a charter application could never be denied on these grounds. This stipulation is more of a tool to be used to discontinue existing charter schools that fail to “reasonably reflect” the overall population of the area which they



serve than one designed at preventing the schools from becoming ethnically distinctive in the first place.

South Carolina also has a statutory stipulation that “under no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten percent.”<sup>130</sup> Nevada law softens the stance of the South Carolina law slightly, stating that “the charter school shall, if practicable, ensure that the racial composition of pupils enrolled in the charter school does not differ by more than ten percent from the racial composition of pupils who attend the public schools in the zone in which the charter school is located.”<sup>131</sup> The New Jersey law is almost identical to that of Nevada, demanding that charter school admissions policies, “to the maximum extent practicable, seek the enrollment of a cross section of the community’s school age population including racial and academic factors.”<sup>132</sup>

This approach may seem to differ only minimally from the approach taken by California. The small difference in wording, however, indicates a significant difference in approach that might translate to a more defensible policy. The California requirement that schools specify up front how they will promote diversity seems based on the underlying assumption that without such consideration, diversity will not occur. On the other hand, simply requiring that charter schools reflect a certain level of diversity, without requiring them to articulate the means by which this will be achieved, seems based on an assumption that no affirmative plan is necessary. In other words, a charter school that simply recruits and admits students on a race-neutral basis is likely to have a student composition that “reasonably reflects” the composition of the school-aged

population within the geographical area it serves. A charter school that has a highly-segregated population, therefore, must be scrutinized by the state or local board or other governing authority, for it may be recruiting or admitting students in such a manner that there is a discriminatory impact on certain groups of students. Though this approach is much more likely to meet with the approval of the courts, the assumption that a predetermined level of diversity can be attained *by chance* is likely incorrect.

In fact, these states have included language in their legislation that acknowledges the difficulty in obtaining the desired level of diversity. The presence of phrases such as “to the greatest extent practicable” seems to allow schools room to enumerate the difficulties that they may be having in recruiting and admitting a more diverse student body. While this type of language adds flexibility to the legislation, it also opens up a possible loophole for any charter school wishing to avoid the challenges of attracting and serving a racially-diverse population. At the campus level, school administrators who realize that school diversity may not happen by chance continue to struggle to find policies and practices that will achieve the goal of diversity but, at the same time, keep them out of court.

North Carolina law requires charter schools to “reasonably reflect the racial and ethnic composition of the general population residing within the school administrative unit in which the school is located.”<sup>133</sup> In the state of North Carolina, almost 13,000 attend charter schools, which translates to roughly one percent of the more than one million public school students in the state. The overall public school population is sixty-two percent white and thirty-one percent African-American. The charter schools reflect a

more even split, approximately fifty-two percent white and forty-three percent African-American.<sup>134</sup> Charter schools have up to one full year of operation before they are expected to be in compliance with the diversity provision of the law. If a North Carolina charter school is seeking to serve a “special population,” that school is only expected to generate a modicum of diversity that is reflective of that special population.<sup>135</sup> Therefore, a school designed to serve an at-risk population might not reasonably reflect the overall population of a geographic area at all. Likewise, a school designed to serve the academically-gifted might also have a demographic mix that is quite different from the general population. According to State Board of Education regulations, schools that fall outside the acceptable range of ethnic diversity are subject to an investigation by the State Charter School Advisory Committee to determine whether that school has made a “good faith effort” to comply with the law.<sup>136</sup> The situation in North Carolina underscores the inherent problems of such state statutes in today’s legal environment – if the state requires a certain ethnic mix of students, how does a school go about crafting an admissions policy that will achieve that goal?

Balancing individual campuses in light of recent judicial trends has not been an easy task. The Arts-Based Elementary Charter School in Winston-Salem, for example, admits students by lot. Originally the school had “sought to disaggregate applications” and draw names from each ethnic group in proportion to the region’s demographic mix. According to Executive Principal Jim Sanders, however, they were led to believe in the fall of 1999 that such an admissions practice would be illegal.<sup>137</sup> The board of the school then turned to marketing efforts in an attempt to achieve the ethnic balance required by

state law. The school undertook a strong public relations campaign, utilizing both public and commercial radio stations as well as three different local papers with ethnically-targeted readership bases. They also resorted to hiring a marketing and public relations consultant and launched a direct mail campaign of school application forms and brochures. This approach has allowed them to fulfill the mandates of the North Carolina statute. Of the 136 students who applied the first year, fifty-one percent were white, twenty-seven percent were African-American, five percent were Asian, seven percent were Hispanic, and ten percent self-identified as mixed or other minorities.<sup>138</sup>

The struggle of the Arts-Based Elementary School to meet the diversity requirements of the North Carolina statute is an excellent example of just how difficult the objective of diversity is. In this particular case, the school seems to have found a method of promoting diversity that is significantly less restrictive than their original plan of using a weighted lottery process. Certainly the idea of attracting a diverse applicant pool through marketing and publicity campaigns, even when targeted at a specific demographic, is within the legal constraints established by courts. Should these measures fail to satisfy the requirements of the state diversity law over the long term, then the school can honestly argue that they have considered, attempted, and ultimately found inadequate race-neutral methods.

#### E. Pursuing Diversity in Connecticut: *Sheff v. O'Neill*

Connecticut has some of the most stringent specifications related to race and diversity of any state, requiring that charter schools describe not only the enrollment procedures they use in order to promote student diversity, but also the efforts they make

towards the recruitment of a diverse teaching staff. School diversity in Connecticut, however, is pursued under circumstances unlike those in any of the other states. A recent interpretation of the state constitution by the Connecticut Superior Court has made the law more restrictive with regard to any state conduct that has a discriminatory impact, whether intentional or unintentional. Because of this context, charter school diversity in Connecticut is difficult to compare to that of other states. Still, there are lessons to be learned from Connecticut's struggle to bring about greater school diversity.

In 1995, the school system in Hartford, Connecticut was not unlike that of other major metropolitan areas throughout the country. Intense racial and economic sorting had led to a situation similar to that in Detroit prior to the *Milliken* case. Ninety-four percent of the students of Hartford were either African-American or Hispanic, three out of four were economically disadvantaged, and the dropout rate was greater than three times the state average.<sup>139</sup> Six years earlier, a lawsuit had been filed in the state court system on behalf of a handful of African-American, Puerto Rican, and white school children, challenging the racial and economic segregation in the Hartford public schools. Fourth grader Milo Sheff, son of Hartford City Councilperson Elizabeth Horton Sheff, would lend his name to the case, known as *Sheff v. O'Neill*, which would become one of the most, if not the most, important education-related cases in Connecticut history. The plaintiffs argued that the clustering of poor students in inner-city schools, coupled with "racial segregation and disparities in the allocation of instructional materials" deprived them of their state constitutional right to an equal educational opportunity as provided by

the Article First, Sections 1 and 20 and the Article Eighth, Section 1 of the Connecticut State Constitution.<sup>140</sup> The litigation, initiated in 1989, was lengthy and complicated.

An essential argument proffered on behalf of the state was that they had been proactive in addressing the inequities inherent in their funding system. Connecticut had been pumping extra dollars into the Hartford schools, where per pupil spending reached \$9,000 annually, which ranked near the top in the state. The extra money, however, failed to erase the gap as student achievement in the Hartford schools was consistently the lowest of any district in the state. In the April 1995 issue of *Time* magazine, Hartford Mayor Michael Peters attempted to explain why more money alone was not solving the problems of the Hartford schools: “Does it make it better education just because we get more money than somebody else? We have special needs in urban areas: bilingual education, special education. That’s what drives the cost up.”

Even after the case first went to trial, the problems with racial and economic sorting continued to worsen. During the 1991-92 school year, the population of the Hartford schools was greater than ninety percent African-American or Latino. Almost sixty-four percent of the Hartford student population qualified for the free and reduced lunch program. By 1996, the percentage of African-American and Latino students in Hartford had grown to ninety-five percent and those who qualified for free and reduced lunch had grown to just over seventy-eight percent. Those numbers stood in stark contrast to the statewide numbers, where only twenty percent of the public school population was comprised of African-Americans or Latinos and less than ten percent of the total state student population qualified for free and reduced lunch.<sup>141</sup>

In July of 1996, the Superior Court of the State of Connecticut announced a four-to-three decision in favor of the plaintiffs. “Racial and ethnic segregation has a pervasive and invidious impact on schools,” reasoned the court, “whether the segregation results from intentional conduct or from unorchestrated demographic factors.”<sup>142</sup> The court found that at the heart of the problem was a statute establishing the method by which school district boundaries were to be drawn, which had remained virtually unchanged since enacted in 1909. In no way did the court indicate that it believed this particular statute was intended to be discriminatory, in fact, they lauded the legislative intent of “increasing state involvement in all aspects of public elementary and secondary education” as well as “permitting considerable local control and accountability in educational matters. Because the Superior Court read the state constitution in such a way that it prohibited both intentional and unintentional discrimination, the lack of discriminatory intent was irrelevant. Despite the apparent good intentions of the state, the court viewed the districting code as the “single most important factor contributing to the present concentration of racial and ethnic minorities in the Hartford public school system.”<sup>143</sup>

Rather than imposing a remedy upon the state’s schools, the court chose to remand the case to the trial court, which was to retain jurisdiction over the matter while allowing the state legislature time to respond. The state’s legislative answer was Public Law 97-290, an act meant to enhance educational choices and opportunities. The new law mandated that, “in order to reduce racial, ethnic and economic isolation,” each school district shall make available “educational opportunities for its students to interact with

students and teachers from other racial, ethnic, and economic backgrounds.” With specific reference to charter schools, the act stipulates that before granting a charter, the State Board of Education must consider “the effect of the proposed charter school on the reduction of racial, ethnic and economic isolation in the region in which it is to be located.” Furthermore, the act requires any group applying for a charter to include in their application how that school will “promote a diverse student body” and to “document efforts to increase the racial and ethnic diversity of staff.”<sup>144</sup>

The decision of the Connecticut Supreme Court in the *Sheff* case created substantial controversy. Those who disagreed with the ruling claimed that it flew in the face of the Supreme Court’s decision in *Milliken v. Bradley*. Walter Olson, a senior fellow at the Manhattan Institute, accused the four-judge majority of inventing a “wholly new constitutional right of children to enjoy ‘access to public school education that is not substantially impaired by racial and ethnic isolation.’”<sup>145</sup> The court’s finding that, even absent discriminatory intent, the state could engage in discriminatory conduct that requires a legal remedy is out of step with most of the contemporary federal cases. What critics such as Olson ignore, however, is that *Sheff* was not a federal case. It was argued and decided based upon Connecticut constitutional principles, which bar both *de jure* and *de facto* discrimination. For this reason, Connecticut charter laws are not easily comparable to those of other states.

Nevertheless, elements of the Connecticut approach may be instructive for other states grappling with the problem of how to foster charter school diversity. The concept of diversity reflected in the Connecticut law is a broad one, encompassing not only



student diversity, but also the diversity of the instructional staff. In addition to a broadly-conceived notion of educational diversity, it is important to note that the legislation does not specify any predetermined percentage of minority or non-minority students for which charter schools are to strive. Instead, the statute is part of an overall reach for educational diversity in all public schools, aimed at providing educational opportunities for students from diverse ethnic and economic backgrounds to meaningfully interact. This view of diversity is one that seems to be in concert with Justice Powell's vision in *Bakke*.

#### F. Charter Laws Without Diversity Provisions

The majority of states with charter school legislation have no provision for the promotion of diversity. Charter schools in Texas may be party to a statewide desegregation order, but the state's charter laws mandate no consideration, by any of the parties involved in the chartering process, of the potential impact a proposed charter school might have upon the ability of surrounding public schools to comply with the terms of the court order. The lack of a diversity clause in the Texas law has given rise to a considerably segregated set of charter schools. In a study conducted on behalf of the Texas State Board of Education in 1997, nine of seventeen charter schools studied had minority populations of ninety percent or more, and eight of those nine schools were designed for "at-risk" students.<sup>146</sup> In an unpublished study in 1999, twenty-six Texas charter schools were examined and eighteen were found to be either primarily (greater than seventy percent) minority or white in student population. Of the eight charter schools that were mixed ethnically, four reported student populations that were either 100

percent economically-disadvantaged or had no economically-disadvantaged students at all.<sup>147</sup> These numbers would certainly seem to validate the concerns of those who worry that charter schools might potentially exacerbate racial and economic isolation.

In Arizona, the lack of a diversity clause may have contributed to white flight from the traditional public schools into charter schools. Almost 55,000 students attend more than 400 charter schools in Arizona. A 1997 study conducted by the United States Department of Education yielded evidence that the percentage of non-minority students in charter schools is greater than the traditional public school in Arizona.<sup>148</sup> This finding is further supported in an article appearing in *Educational Policy Analysis* in which Casey Cobb and Gene Glass detail a study of over a hundred charter schools in Arizona, half of them in urban and half in rural areas. They found that charter schools in Arizona have a significantly greater (twenty percent or more) white student composition than do the traditional public schools. Further, those schools that had predominately minority student compositions tended to be vocational in nature or alternative “last resort” schools for students with serious discipline problems. According to Cobb and Glass, nearly half of the schools studied showed evidence of ethnic separation consistent and substantial enough to “warrant concern among education policymakers.”<sup>149</sup> However, these conclusions have garnered some criticism, most notably from Jay P. Greene. He suggests that their numbers might be skewed due to the fact that Cobb and Glass compared the racial composition of charter schools to that of traditional public schools, rather than comparing them to the racial composition of the broader communities in which the charter schools were located.<sup>150</sup>

## G. The Legal Dangers of the Laissez-Faire Approach to Charter School Diversity:

### The Pueblo Schools

A recent decision by the United States Court of Appeals for the Tenth Circuit clearly demonstrates the dangers inherent in taking a laissez-faire legislative approach to charter schools and diversity. Colorado's legislative omission of any provision to foster diversity, or at least to consider charter schools' prospective impact on neighboring public schools, contributed to a situation in which a charter school opening was perceived as a causal factor in the closure of two public elementary schools. As a result, both the State of Colorado and the Pueblo School District were the targets of a lawsuit under the umbrella of the Fourteenth Amendment of the Federal Constitution as well as Title VI of the Civil Rights Act of 1964.<sup>151</sup>

At the time *Villanueva v. Carrere* was initiated in 1996, Pueblo School District Sixty consisted of thirty-three schools serving approximately 18,000 students, about sixty-four percent of which were minority. The vast majority of those students were of Hispanic origin. In fact, fifty percent of the total student population of the district was Hispanic. The district operated under state law as a "school of choice" district in which children were allowed to choose to attend schools outside of their neighborhoods. Additionally, the district had forged an alliance with the University of Southern Colorado to work toward greater educational quality and resource management.

In 1993, the university submitted to the district board a proposal to establish a charter school within District Sixty to be called the Pueblo School for Arts and Sciences (PSAS). The proposed charter was designed for students who were defined as "at-risk."

The school was to utilize non-traditional pedagogical methods to meet the needs of these students. Though Colorado charter laws do not require consideration of student diversity in a charter school application,<sup>152</sup> the university proposed to recruit and admit a student body that reflected the “educational community of Pueblo in terms of gender, ethnicity, and economic status.”<sup>153</sup> In December of 1993, the Pueblo Board voted to approve the PSAS charter.

In February of 1994, only three months after voting to approve the PSAS charter school, the Pueblo School Board voted to close two nearby elementary schools, Hyde Park and Spann. Both schools served student populations that were about seventy-five percent Hispanic, many of whom were economically-disadvantaged. Each school had programs in place specifically for at-risk children, ranging from the federally-supported breakfast and lunch program to the Chapter I program that made it possible for the teacher-pupil ratios at these two schools to be below the district average.<sup>154</sup> In addition, Hyde Park Elementary was one of only eighteen schools in the nation chosen to be part of “Parent Resource and Involvement Strength Education” (P.R.A.I.S.E.), a successful program to encourage positive parental involvement in the school community. The Board considered various factors in their decision, including projected enrollment figures at the schools targeted for closure as well as other nearby schools, the most efficient use of space, and per-pupil cost analysis.

Most of the students who had attended Hyde Park or Spann were transferred to other schools that were predominately (seventy percent or more) minority. The P.R.A.I.S.E. program was to be transferred to one of these schools, and all Chapter I

funding was to follow each student to his or her new school. In an effort to preserve some continuity for the students, the district attempted to send their teachers with them to their new schools. The district took into consideration the capacities of the receiving schools; however, the ripple effect created by the influx of new students into these schools meant that some students had to be uprooted and moved in order to make room. Although the district tried to consider the proximity of receiving schools, many of the former Hyde Park and Spann students would have to be bused to their new schools. Among those who were still able to walk, many had to traverse treacherous terrain, in some cases having to cross over busy intersections.

Though the closure of these particular schools had been a topic of board discussion for three years, the timing of the decision created the public perception that the closures resulted from the opening of the PSAS. This set in motion a chain of events that led to a class action lawsuit, in which the plaintiffs argued that the board's actions were in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The plaintiffs also challenged the charter school law and the PSAS admissions policy as unconstitutional. The plaintiffs sought, but were denied injunctive relief from a federal district court. They subsequently appealed the case to the United States Court of Appeals for the Tenth Circuit.

The plaintiffs argued that the school board's decision to close the schools had a discriminatory impact upon them. Implicit in this argument was the concept that the closings were the result of the opening of the PSAS charter school. Circuit Judge Henry, after reviewing the "totality of the relevant facts," concluded that the parents' arguments

were insufficient to show that the board had been motivated by discriminatory intent. Indeed, he found it pertinent to point out in his decision that “several of the board members and the Superintendent are themselves Hispanic, and have notable records of commitment to the Hispanic and minority communities of Pueblo.”<sup>155</sup>

Intent is always difficult to prove in court, so the plaintiffs made the additional argument that the decision to close the schools had an unintended discriminatory impact upon them. Again, an underlying assumption was that the decision to close these schools was a direct result of the decision to open PSAS. The Department of Justice policies pursuant to Section 602 of Title VI prohibit practices (by organizations accepting federal funds) that have a disparate impact upon individuals or groups because of race or ethnicity, even when there is no discriminatory intent. The Tenth Circuit, however, dismissed the parents’ claim that the opening of PSAS had a disparate impact upon students of Hispanic origin: “Clearly this cannot be the case, the uncontroverted evidence shows that the 1994-95 projected enrollment at PSAS was about fifty percent Hispanic, compared with approximately the same proportion of Hispanic students in the district-wide population.”<sup>156</sup>

Although the parents’ claim of disparate impact was unsuccessful in this particular case, the concern remained that, in states where charters are issued without any evaluation of how the granting of a charter might impact the surrounding public schools, there would be vulnerability to a claim of disparate impact like the one made in *Villanueva v. Carrere*. In light of the Supreme Court’s 2001 ruling in *Alexander v. Sandoval*, however, those fears seem misplaced. As discussed in Chapter I, the Supreme

Court has ruled that there is no private right to action a disparate impact claim under Section 602 of Title VI. Only actions with discriminatory intent, as prohibited by Section 601 of the Title, are actionable by private parties in federal courts.

Another interesting aspect of the *Villanueva* case involves a challenge to the PSAS admissions policy. As part of their plan to attract a diverse student body, the PSAS administrators strategically divided the Pueblo district into eight separate regions from which they solicited applications for enrollment. Applications were processed on a first-come, first-served basis. The application packets described the details of the admissions process, including the stipulation that all parents would commit eighteen hours of community service to the school; a requirement that many would suggest has a discriminatory impact in and of itself. When the school opened in the 1994-95 school year, the projected student population was sixty-two percent minority and fifty-two percent Hispanic, which was a good representation of the district as a whole.

Pursuant to Colorado law, the admissions policy at the PSAS charter allowed preference for at-risk students. It was the statutory definition of “at-risk” that was the center of the controversy. According to the Colorado law, an “at-risk” student was one “who, because of physical, emotional, socioeconomic, or cultural factors,” would be deemed less likely to be academically successful.<sup>157</sup> Parents identified the word “cultural” as a code word for ethnic minority. The parents argued that the State’s definition of an “at-risk” pupil had created a suspect classification and should therefore call for strict scrutiny. The Tenth Circuit acknowledged that the word “cultural” might, in some circumstances, be used as a proxy for ethnicity, race, or national origin. In this

case, however, it held that the statute created no such classifications. “Even though we might agree in other contexts that treating students differently on the basis of ‘culture’ could trigger strict scrutiny,” the court explained, “the carefully crafted provisions of the Act mandating open enrollment and expressly proscribing discrimination convinces us that no suspect classification has been created.”<sup>158</sup> The court proceeded to uphold the statute using the standard of relaxed scrutiny, finding that the state charter law and PSAS admissions policy were rationally designed to further a legitimate state purpose.

#### H. Chapter Summary

In short, the approach to diversity reflected in charter school laws varies from state to state. Some states, such as Arkansas, have taken the minimal approach of limiting consideration of race to remedial settings, but administering the policy in a reasonably aggressive manner. Other states require charter schools to achieve levels of diversity that are reflective of the public schools in the geographical area that they will serve, or at least articulate a plan in the school charter to work toward such a percentage. Many states do not have diversity clauses in their charter school laws. At least two of those states (Texas and Arizona) have charter school populations that are more segregated than comparable public schools in those states.

In the states where the charter laws are more aggressive regarding diversity, charter schools seem to be struggling to devise campus-level plans that will achieve those goals but stay within constitutional parameters. Some schools have had success by enacting aggressive marketing strategies designed to attract a diverse pool of applicants. Even in states where there are no diversity provisions in the charter school laws, some



schools are attempting to attract diverse student populations, such as in the case of the Pueblo School of Arts and Sciences.

The lesson to be learned from the experience of the Pueblo Schools in Colorado is that there are political and legal dangers inherent when charter schools are perceived to negatively impact existing public schools in any way. Though the Pueblo Board's actions, the Colorado charter law, and the PSAS admissions policy were all successfully defended in federal court, any school board decision that results in public school closings will be politically controversial and is likely to be challenged in a court. Had the Colorado laws required the school board to give more systematic consideration to the impact of the charter school on surrounding public schools, it may have lessened the perception that the school closings were directly related to the opening of PSAS. Further, the careful consideration of campus diversity in the PSAS plan protected their policy from a successful legal challenge.

Table 3 provides a summary of the approaches to the promotion of student body diversity that are found in the various state charter laws. Table 4 lists all fifty states and indicates which have racial balancing provisions in their charter laws, which do not, and which have no charter legislation at all.

Table 3: Summary of Racial Balancing Provisions in Charter School Laws

STATES WITH RACIAL BALANCING PROVISIONS IN CHARTER LAWS	SUMMARY OF PROVISIONS Charter Schools must....
Arkansas ARK. CODE ANN. § 6-23-106(a) (Michie, 2001).	...not hamper desegregation efforts
California CAL. EDUC. CODE § 47605(6)(5)(G) (West 2001).	...specify means by which schools' student body will reflect racial and ethnic balance of the general population living in the school district.
Connecticut 1997 Conn. Acts 290 § 7(c)(4).	...describe student enrollment criteria and procedures to promote a diverse student body, and document efforts to increase racial and ethnic diversity of staff.
Florida FLA. STAT. ANN. § 228.056(10)(a)(8) (West, 1996).	...strive to reflect racial/ethnic balance of community or of other district schools.
Kansas KAN. STAT. ANN. § 72-1906(d)(2) (1994).	...have student body compositions that approximate the racial and socio-economic composition of the district.
Louisiana LA. REV. STAT. ANN. § 3991(C)(3) (West, 1995).	...meet any segregation orders in effect for the district.
Minnesota MINN. STAT. ANN. § 124(D)(9) (West, 2001).	...reflect the racial balance of the area the school serves if it limits enrollment to highly concentrated minority areas.
Nevada NEV. REV. STAT. ANN. § 386.580(1) (Michie, 1997).	...not differ in racial composition more than 10% from the district in which it is located.
New Jersey N.J. STAT. ANN. § 18(A)(8)(e) (West, 1996).	...seek a cross-section of school age population including racial and academic factors
North Carolina N.C. GEN. STAT. § 115C(g)(5)(i) (1996).	...after one year, reasonably reflect racial balance of the district or, if serving a special population, the balance of that population in the school district.
Ohio OHIO REV. CODE ANN. § 115c(g)(5)(i) (West, 1997).	...reflect the make-up of the community served and comply with any desegregation order in effect.
Oklahoma OKLA. STAT. ANN. tit. 30 § 3-140(B) (West, 1999).	...comply with any court order in effect.
Rhode Island R.I. GEN. LAWS § 16-77-4 (1995).	...have a program for encouraging enrollment of diverse population. Low socio-economic, Special Education, and limited English-proficient students must equal combined percentage of the district as a whole.
South Carolina S.C. CODE ANN. § 59-40-50(B)(6) (Law Co-op, 1996).	...not differ in racial composition more than 10% from the district in which it is located.
Virginia VA. CODE ANN. § 22.1 (Michie, 1998).	...comply with any existing court orders.
Wisconsin WIS. STAT. ANN. § 118.40(1m)(b)(9) (West, 2001).	...mirror district in racial composition.

Table 4: Summary of State Charter Laws

	LAW HAS RACIAL BALANCING PROVISION	LAW HAS NO RACIAL BALANCING PROVISION	STATE HAS NO CHARTER LAW
Alabama			X
Alaska		X	
Arizona		X	
Arkansas	X		
California	X		
Colorado		X	
Connecticut	X		
Washington, D.C.		X	
Delaware		X	
Florida	X		
Georgia		X	
Hawaii		X	
Idaho		X	
Illinois		X	
Indiana		X	
Iowa			X
Kansas	X		
Kentucky			X
Louisiana	X		
Maine			X
Maryland			X
Massachusetts		X	
Michigan		X	
Minnesota	X		
Mississippi		X	
Missouri		X	
Nebraska			X
Nevada	X		
New Hampshire		X	
New Jersey	X		

Table 4: Summary of State Charter Laws – continued

	LAW HAS RACIAL BALANCING PROVISION	LAW HAS NO RACIAL BALANCING PROVISION	STATE HAS NO CHARTER LAW
New Mexico		X	
New York		X	
North Carolina	X		
North Dakota			X
Ohio	X		
Oklahoma	X		
Oregon		X	
Pennsylvania	X		
Rhode Island	X		
South Carolina	X		
South Dakota			X
Tennessee			X
Texas		X	
Utah		X	
Vermont			X
Virginia	X		
Washington			X
West Virginia			X
Wisconsin	X		
Wyoming		X	

## CHAPTER V

### LEGALLY PERMISSIBLE POLICY OPTIONS

Study of the legal themes and judicial concerns that surround the use of race-sensitive admissions policies indicates that such policies are extremely difficult, if not impossible, to defend in the courts. The contemporary judicial consensus is that any racial classification is inherently suspect and demands the strictest of scrutiny. Even though Justice Powell, in *Bakke*, established the legal principle that the government has a compelling interest in fostering student body diversity (at least in the arena of higher education), most Federal Circuits have expressed some concern about the continued viability of this proposition. In fact, the assumption that student body diversity constitutes a compelling state interest has been completely thrown aside by the Fifth Circuit.

Outside of the Fifth Circuit, where student body diversity is still “assumed” to be a compelling state interest, many challenged race-sensitive policies have been unable to satisfy judicial concerns regarding narrow tailoring. Because the tests of narrow tailoring applied by various Federal Circuits have been so difficult for policies to pass, charter school administrators who wish to promote diversity would be well advised to completely avoid the use of race in admissions. A safer approach would be to aggressively pursue the recruitment of a racially-diverse applicant pool and then attempt to admit students from that pool on a random, race-neutral basis. If these measures are unsuccessful and

the applicant pool is not sufficiently diverse, then charter school administrators should consider a variety of race-neutral traits and attributes when making admissions decisions. Only if these race-neutral measures have proven unable to accomplish a reasonable level of diversity should policymakers even consider the use of race. Should a policy include a racial consideration, it must be crafted very carefully in order to have the best chance of passing a narrow tailoring analysis. This final chapter provides several policy options that, based upon this research, would seem to have the greatest odds of surviving a legal challenge.

#### A. The State Level

While consideration of charter school diversity in state statutes does not guarantee that charter schools will be diverse, it seems important that the state provide at least some philosophical leadership with regard to the role of diversity in the educational process. States have taken numerous approaches to the issue of diversity in their charter schools, ranging from more aggressive approaches such as North Carolina or New Jersey to the hands-off approach taken by states such as Arizona and Texas.

State statutory provisions for charter school diversity generally allow for autonomy at the campus level. No state law requires charter schools to actually implement race-sensitive policies, but by specifying that charter schools reflect certain pre-determined ethnic ratios, some state provisions could inspire campus-level programs that resemble an illegal system of racial quotas. If, for example, a charter school enacted a policy that reserved a certain number of admission slots for African-American students in order to meet a state requirement that it reflect the demographics of an area, it is

extremely unlikely that such a policy would survive legal challenge. A state requirement that schools statistically reflect a certain racial or ethnic distribution, without some direction on how to achieve it, leaves charter school administrators uncertain about how to proceed. On the other hand, a state charter school law that omits any discussion of school diversity provides no guidance to charter school administrators and makes it less likely that individual campuses will undertake any meaningful effort to establish a diverse student body.

At the same time, it is clear that even in those states where charter laws make no mention of charter school diversity, school administrators may not ignore or disrupt existing desegregation orders. In Texas, a statewide court desegregation order still applies to most districts even though the charter application process does not require explicit consideration of it prior to granting a charter. This being the case, it seems advisable for state charter legislation to include a stipulation requiring an analysis during the charter application process of the possible impact of proposed charter schools upon existing court-ordered desegregation requirements. Such a requirement is clearly within the bounds of federal constitutional law and would serve as a clear statement from state leaders that charter schools are designed to foster diversity, not to allow parents to re-segregate their children along racial or economic lines. The law in Arkansas seems to be a good example of this type of state legislation, requiring a “careful review” by all involved parties (chartering group, host school district, and State Department of Education) to determine what type of impact the establishment of a charter school might have upon a school’s or district’s ability to comply with court-orders or statutory

obligations regarding school desegregation. Furthermore, it would be prudent for state charter legislation to stipulate that all charter schools comply with existing desegregation orders once in operation.

Another advisable feature for state law would be a general statement regarding the value of educational diversity, similar to what is found in the Connecticut law, which requires that all schools provide “educational opportunities” for students and teachers from diverse “racial, ethnic, and economic backgrounds.” The focus of the statute on educational opportunities and interpersonal interactions between both students and teachers seems to define diversity in broad terms that are likely to meet with judicial approval. The law makes no suggestion that schools should mirror any predetermined racial distribution; it simply mandates that students be provided opportunities to interact with people of diverse backgrounds. The inclusion of teachers in the equation broadens the concept of educational diversity beyond student admissions, and the inclusion of economic diversity broadens it beyond race. Connecticut law also stipulates that, during the application process, charter school applicants must describe how they plan to promote diversity within their student body and document efforts to recruit a diverse teaching staff. Again, this stipulation implies no rigid use of quotas; it simply requires prospective charter schools to consider the role of educational diversity in their planning processes.

Diversity in Connecticut public schools is driven by the state constitution and case law mandating an aggressive approach toward both *de jure* and *de facto* segregation. Therefore, any model for diversity derived from Connecticut law has limited utility in other states. Nevertheless, the language in the Connecticut law effectively broadens the



concept of diversity in the educational setting to one that might be more successfully defended under strict scrutiny. Table 5 contains an example of how such language might be built into a charter law.<sup>159</sup>

Table 5: Sample Diversity Provision in State Charter Law

Section X – Admissions

- (a) Charter school applications should address the school’s plan to:
  - (1) Recruit and maintain a student body that is diverse with regard to a broad array of personal qualifications and characteristics, of which racial or ethnic origin is but a single though important element.
  - (2) Recruit and maintain a diverse teaching staff.
  - (3) Establish a culture that promotes interaction between students and teachers of diverse backgrounds.
- (b) In districts where there are existing court desegregation orders, all charter school applications will be reviewed by the impacted local and state board of education to assess the potential impact that the charter might have upon efforts to comply with the order.
- (c) If located within a district that is party to an existing desegregation order, a charter school must comply with the terms of that order and may not contravene the ability of the district to comply with the court order.

## B. The Campus Level

Though the state statutory framework may provide the philosophical underpinnings for promoting student diversity, it is at the campus level that admissions policies and practices must be implemented. Because research has shown so clearly that race-sensitive policies are legally suspect, this discussion will begin with an examination of race-neutral strategies before offering suggestions on how race might be part of a narrowly tailored admissions policy.

## 1. Race-Neutral Alternatives

### a. The Applicant Pool

Most charter schools have open enrollment, which means they will admit any student who meets the standard admissions requirements in terms of age and residence. In the event that a charter school has more prospective students than it has space, students are generally admitted by lot. Therefore, the first action a charter school can take to achieve educational diversity would be develop a plan to recruit a diverse pool of applicants. If the school has space to admit any and all applicants, then the diversity of the school and the applicant pool will be synonymous. If the school is forced to admit students by lot, a diverse applicant pool does not guarantee a diverse student body, but its absence will obviously result in a segregated school.

School administrators must rely on strategic recruitment strategies in attempting to build a diverse applicant pool. Although some charter schools are designed to serve students in a small and specific geographic area, many charter schools serve students from very diverse areas of the city in which they are located. In such cases, a viable strategy would be to subdivide the geographic area from which a school will draw its students into zones of recruitment. This enables the school to customize marketing strategies to the parents and students in a particular area. Creating geographic zones of recruitment also encourages a systematic approach to recruitment and increases the probability that a school will draw evenly from various areas that may differ considerably in ethnic and economic make-up. This approach seemed to work well for the Pueblo School of Arts and Science (PSAS), a charter school in Pueblo, Colorado, that was part of

a cooperative effort between the district and the University of Southern Colorado. The PSAS divided the Pueblo district into eight different zones from which they solicited applications, when the school opened, it reflected a greater level of diversity than the public schools nearby, which were predominately Hispanic.<sup>160</sup>

Charter schools may also rely on marketing and public relations tactics to solicit applications from a diverse mix of students. Advertising may be targeted demographically by selecting certain media sources. Broadcast and print media, billboards, Internet, direct mail and other strategies can be effective tools for targeting a message to a desired audience. For example, a school might attract applications from minority students by buying advertising air time on a Spanish-language television or radio station. Through selective use of advertising media, schools can target their message to various ethnic, economic and age groups. This approach proved effective for the Arts-Based Elementary School in Winston-Salem, North Carolina. The school hired a marketing coordinator to help plan its public relations and marketing, which included not only print and broadcast media, but also a direct-mail campaign.

Many charter schools, however, lack the funding for extensive advertising campaigns. Media-savvy school administrators, however, can engage in fruitful public relations campaigns without resorting to paid advertisements. Building a strong working relationship with local print and broadcast media can be an effective way of communicating with prospective students. Ensuring that the media are informed about important school programs or initiatives can generate considerable public attention that

may lead to student interest. Local print media can play an invaluable role in publicizing vital information related to the school, its procedures, programs and governance.

If a charter school can successfully recruit a diverse pool of applicants, then educational diversity may be attainable without having to resort to racial considerations in the admissions process. Table 6 is a sample charter school policy statement related to the recruitment of a diverse applicant pool.

Table 6: Sample Charter School Statement on Applicant Pool Diversity

In the interest of promoting student diversity encompassing a broad array of qualifications and characteristics, of which racial or ethnic origin is but a single though important element, [Name of Charter School] will recruit applicants using the following procedures:

- (a) Divide our geographic boundaries into five separate “recruitment zones”
- (b) Assign a team of recruiters to each zone.
- (c) Devise recruitment strategies for each zone that address the relevant concerns of the students and parents residing there.
- (d) Hire a public relations/media consultant to work with recruiters to assist them in planning appropriate marketing campaigns, including but not limited to:
  - (1) Advertising in print or broadcast media or other appropriate forms of advertising.
  - (2) Establishing relationships with local print and broadcast media in order to improve dissemination of information about school programs to the public through the news media.
  - (3) Planning and promoting public meetings or school events

The recruitment of a diverse applicant pool is absolutely necessary if a charter school wishes to foster educational diversity. Without applicant diversity, there can be no student body diversity. Further, a charter school that aggressively attempts to recruit a diverse applicant pool is making a statement, even before the admissions process begins, that educational diversity is an important school goal and that they will exhaust all race-neutral alternatives in the pursuit of it.

#### b. The Admissions Process

While it is hoped that actions taken to recruit a diverse applicant pool will be successful, this may not always be the case. So what alternatives might a school have when their efforts to recruit a diverse applicant pool either fail or do not yield the desired student diversity? For the purposes of this discussion, imagine a charter school that has many more prospective students than it has the ability to admit. If the applicant pool, when subject to a lottery process, is likely to yield a student body that is segregated along racial or ethnic lines, what race-neutral admissions criteria could be substituted to minimize the level of segregation at that school?

This research suggests that there are numerous considerations that charter school officials may take into account in terms of admission. The case law suggests that, if true educational diversity is the goal, the school can legally consider a variety of race-neutral characteristics when evaluating a student's application for admission. A student with unusual work or volunteer experience or a student who has lived or traveled abroad, for example, may be more likely to contribute to educational diversity on the campus than the average applicant. An admissions procedure that enabled such individual characteristics to be evaluated, perhaps through an interview or essay process, would enable a charter school to select students from an applicant pool who would enhance educational diversity. However, these techniques might not necessarily add to the racial or ethnic mix of the students on the campus.

A trait that is often mentioned as a potential race-neutral criterion is the socio-economic level of a student. Case law suggests that, while racial classifications are

inherently suspect, socio-economic classifications are not. The Eleventh Circuit, in *Johnson v. Board of Regents*, made explicit reference to socio-economic status as a legally-permissible consideration in freshman admissions at the University of Georgia: “Similarly, there may be innovative strategies in the admissions process itself, ranging from income-based selection to guaranteeing admission to the top percentage of graduating seniors in every high school in the state.”<sup>161</sup> Even the Fifth Circuit in *Hopwood* acknowledged that schools may constitutionally consider the applicant’s economic and social background.<sup>162</sup> Because research shows such a tight correlation between race and socio-economic status, consideration of the applicant’s socio-economic status in the admissions process would likely effectuate racial and ethnic diversity.

Although case law seems generally supportive of such a consideration, an admissions policy that considers an applicant’s socio-economic status might be vulnerable to a legal challenge under the argument that it is simply another means of considering race. An interesting example is the Arlington Traditional School policy, which was struck down by the Fourth Circuit in *Tuttle*. This policy was actually a revised version of an earlier Arlington policy that had been ruled illegal by the Federal Court for the Eastern District of Virginia. Although the original policy limited consideration only to race and ethnicity, the revised policy included a socio-economic component. The school district mistakenly believed that the new policy would better comply with the concerns of the district court. The district court, however, issued a permanent injunction preventing the school from implementing the policy. In an unpublished memorandum opinion, the court expressed concern that the Arlington

schools were simply trying to “achieve the same end that was held unconstitutional...merely by a different process.”<sup>163</sup> To protect against this point of attack, charter school administrators who are considering socio-economic preferences should attempt, from the very beginning, to establish a broad concept of diversity that includes consideration of a variety of other individual characteristics that might contribute to the educational diversity of the campus.

Table 7 contains three race-neutral admissions policy statements. The first example concentrates solely on the recruitment of a diverse applicant pool and then admits students by lottery. The second example adds an essay/interview process, but at no point is race or ethnicity considered by the admissions committee. The policy is, like the Harvard policy discussed by Justice Powell in *Bakke*, designed to give specific and individual consideration of each prospective student’s background (race excluded) and what he or she could bring to the campus in terms of educational diversity. As a completely race-neutral alternative, this option does not guarantee a racially-diverse student body, but the consideration of a range of race-neutral characteristics would yield a student body that is meaningfully diverse in other ways. It is quite possible that an incidental by-product might be increased racial diversity.<sup>164</sup> The third race-neutral policy option combines the measures designed at recruiting a diverse applicant pool with the essay/interview process and includes the added consideration of an applicant’s socio-economic status. Correlation of socio-economic status with race suggests that this is the most likely of the three options to yield a racially-diverse student body. Combined with

Table 7: Sample Race-Neutral Charter School Admissions Policies

<p><b>Example 1:</b> Educational diversity is valued at [Name of Charter School]. We will strive to attract and maintain an educational community in which students have opportunities to interact with others from diverse backgrounds. Through strategically-planned public relations campaigns, we will seek to build a highly-diverse pool of applicants from each recruitment zone. As long as there is space available, we will admit any student who applies. Should the number of applicants exceed spaces available, we will admit students by lot.</p>
<p><b>Example 2:</b> Educational diversity is valued at [Name of Charter School]. We will strive to attract and maintain an educational community in which students have opportunities to interact with others from diverse backgrounds. Through strategically-planned public relations campaigns we will seek to build a highly-diverse pool of applicants from each recruitment zone. <b>Prospects will submit a short biography and participate in an interview during which he/she will be asked to speak about the unique contributions he/she could make to the diversity of the learning community. Students will be asked about personal attributes, skills, and experiences that would distinguish them from other applicants. Upon reading student essays and participating in the interview process, the admissions committee will rate students on a ten-point scale in the areas of work/volunteer experience, experience with foreign cultures, history of overcoming adversity, special talents or abilities, unique family or living circumstances, and educational goals. When the number of applicants exceeds the numbers of spaces available, preference will be given to students who rate most highly in the essay and interview process. Space permitting, every applicant will gain admission.</b></p>
<p><b>Example 3:</b> Educational diversity is valued at [Name of Charter School]. We will strive to attract and maintain an educational community in which students have opportunities to interact with others from diverse backgrounds. Through strategically-planned public relations campaigns we will seek to build a highly-diverse pool of applicants from each recruitment zone. Prospects will submit a short biography and participate in an interview during which he/she will be asked about to speak about the unique contributions he/she could make to the diversity of the learning community. Students will be asked about personal attributes, skills, and experiences that would distinguish them from other applicants. Upon reading student essays and participating in the interview process, the admissions committee will rate students on a ten-point scale in the areas of work/volunteer experience, experience with foreign cultures, history of overcoming adversity, special talents or abilities, unique family or living circumstances, and educational goals. When the number of applicants exceeds the numbers of spaces available, preference will be given to students who rate most highly in the essay and interview process. <b>Additionally, the admissions committee may give a preference of three points to candidates who come from economically-disadvantaged backgrounds. Space permitting, every applicant will gain admission.</b></p>

other race-neutral measures designed to foster educational diversity, the use of socio-economic status is less likely to be successfully attacked as a thinly veiled proxy for race.



## 2. Narrowly Tailored Alternatives

All of the policy alternatives discussed up to this point are race-neutral, and as such, are clearly within the limits of the Federal Constitution. If these alternatives fail to achieve diversity within a charter school's student body, then policy makers have the difficult decision of whether to consider race in their admissions processes. Clearly, until such a time that the Supreme Court should overturn Justice Powell's proclamation that diversity constitutes a compelling governmental interest, it remains good law in every Federal Circuit except the Fifth. Therefore, a narrowly tailored race-based policy in the interest of student diversity would be constitutional. The difficulty inherent, however, is that such a policy has yet to be designed. The following section includes race-sensitive policy options crafted in such a way that they might withstand the narrow tailoring portion of a strict scrutiny analysis. These policy samples are not guaranteed to survive legal challenge, but they are designed in light of the judicial concerns regarding narrow tailoring that have emerged during this research.

Before addressing the tailoring of a policy aimed at increasing diversity, it is of vital importance that the school has established a broadly conceived notion of diversity that encompasses a wide range of traits and characteristics in addition to race and ethnicity. Assuming that policymakers articulate a broad vision of educational diversity, the policy itself must be narrowly tailored to that end. Though not all courts have applied exactly the same test of narrow tailoring, a four prong test seems to have emerged from the case law. First, the school must have genuinely considered and perhaps even attempted race-neutral strategies to achieve diversity. Second, the policy must allow for

adequate consideration of student traits and characteristics unrelated to race or ethnicity that might contribute to campus diversity. Third, the policy may not be mechanical, rigid or substitute in any way for a meaningful consideration of the applicant as an individual. Fourth, the policy must not have a disproportionate impact upon those harmed or helped by it.

A logical starting point for educational policymakers is with the consideration of race-neutral alternatives, as outlined in the previous section. If there is no evidence that policymakers gave real consideration to race-neutral alternatives, then any subsequent race-sensitive plan is destined to fail a narrow tailoring analysis. It is therefore essential that charter schools begin their quests for diversity by implementing race-neutral strategies designed to increase the diversity of their applicant pool. A school that has not done so cannot argue with legitimacy that it has considered all race-neutral alternatives.

The narrowly tailored policy must include adequate consideration of race-neutral student characteristics and traits that might be expected to contribute meaningfully to the educational diversity of the campus. Consideration of race or ethnicity in isolation would increase racial diversity but not meaningfully contribute to real educational diversity, which would cause a policy to fail the test of narrow tailoring. Use of race should be but a minor part of an overall strategy aimed at cultivating the educational diversity of the school. Depending on the characteristics of the individual students involved, a minority student may not actually contribute to campus diversity as much as a non-minority student. A policy that is unable to adjust for such situations is legally flawed in its tailoring.

When policymakers have genuinely considered and perhaps even unsuccessfully implemented race-neutral measures prior to enacting a race-sensitive policy, and if the policy takes into account race-neutral characteristics that might contribute to the overall educational diversity of the campus, then the policy might survive the first two prongs of a narrow tailoring analysis. It must then be demonstrated that the manner in which the policy takes race into account is not mechanical or rigid and does not substitute for individual consideration of the contribution to educational diversity that each applicant, regardless of his or her race, might make to the campus.

If the policy ranks applicants quantitatively and awards a pre-set bonus for an applicant's racial status, then the policy is vulnerable to the criticism that the use of race is mechanical or rigid. This type of racial consideration undermines the ability of admissions committees to make individualized decisions regarding how a student might contribute to campus diversity. The fact that a student might be an ethnic minority might indeed be a bonus to overall campus diversity; however, it is possible that a non-minority student, who might have made a greater contribution to the campus diversity, would be rejected under this plan due simply to the fact that he or she did not receive the same bonus that the minority student received. This is part of what the Eleventh Circuit objected to in the University of Georgia policy. Further, any admissions policy that involves a pre-determined "quota" of students to be admitted from any particular racial group would likely fail the test of flexibility. Simply setting aside a certain number of admission slots to be given to members of racial minorities is, in the view of many courts, rigid and mechanical, and in essence is nothing more than illegal racial balancing.

In order to pass this particular prong of a narrow tailoring test, the manner in which race is considered in a policy would have to be extremely flexible. An example might be to consider, along with the numerous other race-neutral traits and characteristics, a prospective student's cultural awareness or lack thereof. Cultural awareness might be defined as a student's knowledge of cultures other than his or her own and level of comfort interacting with persons of different cultures. If an applicant is a member of a cultural or racial minority, he or she is likely, but not guaranteed, to score well on that indicator. This type of approach seems to be more philosophically in line with the Harvard policy that Justice Powell advocated in his *Bakke* opinion. It also seems to more effectively address the concerns over flexibility voiced by the Eleventh Circuit in *Johnson*. Under such a policy, it is possible that a minority student with a middle class background may lose out to an applicant who is white but, due to his or her cultural background, may score much higher in the area of cultural awareness.

A more direct approach would be to establish a bonus for minority applicants, but rather than awarding a predetermined bonus, award the candidate a bonus from within a point range depending upon individual consideration of that candidate's potential contribution to campus diversity. For example, awarding every minority candidate a racial bonus of three points might be attacked as rigid and mechanical. If a bonus of *up to three points* were to be awarded, however, based not only on race but also on other personal or background characteristics that make that candidate more likely to contribute to campus diversity, a judge might view it as a flexible use of race.

Another consideration in narrow tailoring analysis is the nature of the impact, either positive or negative, that the policy has on individuals. If race is used, it must not be used in such a way that it benefits (or harms) a group in an arbitrary or disproportionate way. This was another criticism leveled by the Eleventh Circuit upon the University of Georgia plan. The half-point bonus given to minority applicants had no basis in fact – the university admitted it was simply picked out of the blue. Further, in relation to other factors considered, the half-point bonus was a substantial one that seemed to have a greater impact on those affected by it than almost any of the other factors being considered. Policymakers who wish to implement a policy that incorporates a preference for race must exercise great care to be sure that whatever preference is given has a rational basis and that the consideration given to race is reasonable in relation to the other factors being considered.

Though the Eleventh Circuit did not include it in their narrow tailoring analysis, the Fourth Circuit thought it appropriate to examine the duration of such a policy. Whether the policy in question had a stopping point or whether it was a policy to be in practice indefinitely was an important consideration in the Fourth Circuit *Tuttle* case. The Eleventh Circuit, however, found the question less relevant in *Johnson*, explaining that the attainment of a diverse student body, assuming that it is a compelling state interest, does not necessarily need to have a finite timeline. The Eleventh Circuit's opinion notwithstanding, it would seem that, in some cases, it might be appropriate to question the policy duration in a narrow tailoring analysis. If policymakers are expected to give consideration to race-neutral alternatives before resorting to race-sensitive

options; then why shouldn't they continue to assess the viability of race-neutral options, even after a race-sensitive policy has been implemented? It would seem that when an acceptable level of diversity has been achieved, the school might be able to drop the race-sensitive aspects of its policy and return successfully to race-neutral options. A policy that includes the flexibility to consider race-neutral options even after race-sensitive measures have been utilized might have the "logical stopping point" that the Fourth Circuit sought, and therefore be more likely to survive a legal challenge.

Table 8 contains two examples of narrowly tailored race-sensitive admissions policies. The first example linguistically skirts the use of race by including the consideration of a student's "cultural awareness." The second example, however, explicitly states that the admissions committee may consider the race or ethnicity of a prospective student. It is important to note that the second sample policy may not survive a legal challenge. Any use of race in an admissions policy should be undertaken with great caution and only when all other race-neutral options have failed.

### C. Chapter Summary

States should not mandate that charter schools achieve a pre-determined racial and ethnic mix, but they should require charter schools to follow existing court orders and statutory obligations regarding school desegregation. Further, states should compel charter schools to make meaningful consideration of diversity in their planning process, whether in the application stage or once the school is in operation. State law may also help craft a broad definition of educational diversity that encompasses more than race or

Table 8: Sample Race-Sensitive Admissions Policies

**Example 1:** Educational diversity is valued at [Name of Charter School]. We will strive to attract and maintain an educational community in which students have opportunities to meaningfully interact with others from diverse backgrounds. Through strategically-planned public relations campaigns we will seek to build a highly-diverse pool of applicants from each recruitment zone. Prospects will be required to complete a short biography of themselves and participate in an interview during which he/she will be asked about to speak about the unique contributions he/she could make to the diversity of the learning community. Upon reading student essays and participating in the interview process, the admissions committee will rate students on a ten-point scale in the areas of work/volunteer experience, experience with foreign cultures, history of overcoming adversity, special talents or abilities, unique family or living circumstances, and educational goals. Additionally, the admissions committee may give a preference of three points to candidates who come from economically disadvantaged-backgrounds. Space permitting, every applicant will gain admission. **If the above procedures are insufficient in achieving the campus goal of promoting educational diversity, the admissions committee may rank applicants based upon their cultural awareness. This component of the admissions process will carry the least weight of any of the factors considered during admission. As soon as school administrators feel the campus has established a meaningfully diverse climate in which students have adequate opportunities to interact with people from diverse backgrounds, this consideration will be discontinued.**

**Example 2:** Educational diversity is valued at [Name of Charter School]. We will strive to attract and maintain an educational community in which students have opportunities to meaningfully interact with others from diverse backgrounds. Through strategically-planned public relations campaigns we will seek to build a highly-diverse pool of applicants from each recruitment zone. Prospects will be required to complete a short biography of themselves and participate in an interview during which he/she will be asked about to speak about the unique contributions he/she could make to the diversity of the learning community. Upon reading student essays and participating in the interview process, the admissions committee will rate students on a ten-point scale in the areas of work/volunteer experience, experience with foreign cultures, history of overcoming adversity, special talents or abilities, unique family or living circumstances, and educational goals. Additionally, the admissions committee may give a preference of three points to candidates who come from economically disadvantaged backgrounds. Space permitting, every applicant will gain admission. **If the above procedures are insufficient in achieving the campus goal of promoting educational diversity, then admissions officers may consider a candidate's racial or ethnic background in its assessment of how much the individual student is likely to contribute to the educational diversity on campus. As soon as school administrators feel the campus has established a meaningfully-diverse climate in which students have adequate opportunities to interact with people from diverse backgrounds, this consideration will be discontinued.**

ethnicity. This type of philosophical leadership from the state is important if there is going to be a successful push for diversity in charter schools.

While it is important for state law to set the tone with regard to diversity, it is imperative that charter school administrators implement effective strategies toward the recruitment of a diverse applicant pool. There are several strategies outlined in this chapter that will assist charter school administrators in this endeavor. If a charter school can recruit a diversity of applicants, then consideration of race in an admissions policy will likely be unnecessary. If the applicant pool is not diverse, then there is little chance of achieving student body diversity even with a race-sensitive admissions policy.

Charter school administrators would perhaps be well advised to avoid the use of race in admissions decisions, at least until they have exhausted all possible race-neutral options. The case law suggests that, while student diversity is still a compelling state interest (everywhere but the Fifth Circuit), the test of narrow tailoring is indeed a difficult one to pass. This chapter has offered some race-sensitive policy options that address the most commonly articulated judicial concerns regarding narrow tailoring. The research suggests that these options, if implemented as a last resort after race-neutral options have been unsuccessfully attempted, would likely pass the kind of narrow tailoring analysis applied by Justice Powell in *Bakke* and by the Fourth and Eleventh Circuits in *Tuttle* and *Johnson*, respectively.

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<sup>1</sup> Gutmann, Amy. "Civic Education and Social Diversity" *Ethics*, April, 1995. p. 556.

<sup>2</sup> Gutmann, Amy. *Democratic Education*. Princeton UP. Princeton, NJ, 1987. p. 58.



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<sup>3</sup> Henderson, Vernon, Peter Mieszkowski and Yvon Sauvageau, “Peer Group Effects and Educational Production Functions,” *Journal of Public Economics*. Vol. 10, 1978. p. 105.

<sup>4</sup> Kahlenberg, Richard. “Mixing Classes: Why Economic Desegregation Holds the Key to School Reform” *The Washington Monthly Online*, p. 3.

([www.washingtonmonthly.com/features/2000/0012.kahlenberg.html](http://www.washingtonmonthly.com/features/2000/0012.kahlenberg.html)).

<sup>5</sup> “The New Diversity,” Orfield, Gary; Kahlenberg, Richard; Gordon, Edmund; Genesee, Fred; Slocumb, Paul; Payne, Ruby. *Principal*, v. 79, n5 p. 6-32, May 2000.

<sup>6</sup> “Mixing Classes: Why Economic Desegregation Holds the Key to School Reform,”

Kahlenberg, Richard. *The Washington Monthly*, December 2000, p. 3.

([www.washingtonmonthly.com/features/2000/0012.kahlenberg.html](http://www.washingtonmonthly.com/features/2000/0012.kahlenberg.html)).

<sup>7</sup> “Pupils’ Poverty Drives Achievement Gap.” Schulte, Bridget; and Keating, Dan. *The Washington Post*, Sunday, September 2, 2001, Page A01. ([www.washingtonpost.com](http://www.washingtonpost.com)).

<sup>8</sup> Wake County had, until 2000, enforced a race-sensitive transfer policy, which was discontinued after the Fourth Circuit ruling in *Eisenberg v. Montgomery County*, which held a similar policy in neighboring Montgomery County to be unconstitutional. This case will be analyzed in detail in a Chapter III of this dissertation.

<sup>9</sup> Juenke, Eric; and Black, Les. *Do Choosy Moms Choose Diversity?* Unpublished, The University of North Texas, 2000.

<sup>10</sup> Orfield, Gary and John Yun, “Resegregation in American Schools.” Published by The Civil Rights Project at Harvard University, 1999, p. 18.

<sup>11</sup> Kahlenberg, p. 9.

<sup>12</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>13</sup> Orfield and Yun, p. 2.

<sup>14</sup> Orfield and Yun, p. 33.

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<sup>15</sup> *Green v. County School Board*, 390 U.S. 430 (1968). It is interesting to note that, while this particular choice plan was not deemed adequate, the Court did not rule out choice plans in general to facilitate integration.

<sup>16</sup> *Swann v. Charlotte-Mecklenburg Board of Education*, 402 US 1, 16 (1971).

<sup>17</sup> *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>18</sup> *Milliken v. Bradley*, 338 F. Supp. 582, 587 (E.D. Mich. 1971).

<sup>19</sup> *Milliken v. Bradley*, 418 U.S. 717, 755 (1974).

<sup>20</sup> *Id.* at 759.

<sup>21</sup> *Id.* at 782.

<sup>22</sup> *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

<sup>23</sup> *Id.* at 251. Marshall repeatedly and staunchly defended the philosophy of *Brown*, the case he successfully argued years before in the Supreme Court. His successor on the Court, Justice Clarence Thomas, has been an outspoken critic of the *Brown* decision as well as the social science evidence upon which it was based.

<sup>24</sup> *Freeman v. Pitts*, 503 U.S. 467 (1992). The Court allowed the county schools to be released from the court-ordered desegregation plan in the areas listed above. It suggested, however, that the district still had work to do in order to achieve unitary status in the areas of faculty assignment and resource allocation.

<sup>25</sup> *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995).

<sup>26</sup> 42 U.S.C. 2000d and d1.

<sup>27</sup> 28 CFR 42 104 (b) (2) (1999).

<sup>28</sup> *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

<sup>29</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>30</sup> *Sandoval v. Hagan*, 7 F. Supp. 2d. 1234 (1998).

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<sup>31</sup> *Sandoval v. Hagan*, 197 F. 3d. 484 (1999).

<sup>32</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>33</sup> *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

<sup>34</sup> *Id.* at 299.

<sup>35</sup> *Id.* at 307.

<sup>36</sup> *Id.* at 310.

<sup>37</sup> *Id.* at 311.

<sup>38</sup> *Id.* at 312. Cited from *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

<sup>39</sup> *Id.* at 312.

<sup>40</sup> *Keyishian v. Board of Regents* 385 U.S. 589, 603 (1967).

<sup>41</sup> *University of California Regents*, at 312.

<sup>42</sup> *Id.* at 357. Cited from *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

<sup>43</sup> *Id.* at 358.

<sup>44</sup> *Id.* at 359. Concurrence cites *Califana v. Webster*, 430 U.S. 313 (1977), which, in turn, quotes from *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>45</sup> As discussed previously, *Lau v. Nichols* and *Cannon v. University of Chicago* seemed to support the proposition that, in relation to Title VI and Title IX, actions having a disparate impact against a group or gender were illegal and relief could be sought by individuals. The recent decision in *Sandoval*, however, seems to have countered the earlier case law, at least with regard to Title VI.

<sup>46</sup> *University of California Regents*, at 366.

<sup>47</sup> *Id.* at 372.

<sup>48</sup> *Id.* at 373.

<sup>49</sup> *Id.* at 396.

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<sup>50</sup> *Id.* at 402

<sup>51</sup> *Id.* at 411.

<sup>52</sup> *Wygant v. Jackson Board of Education et al.*, 476 U.S. 267 (1986).

<sup>53</sup> *Id.* at 286.

<sup>54</sup> *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476. (1989).

<sup>55</sup> *Id.* at 480.

<sup>56</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>57</sup> This case is interesting in that it gives us a glimpse at the “Equal Protection” reasoning of Justices O’Connor, Kennedy, and Scalia, none of whom were on the Court at the time of the *Bakke* decision.

<sup>58</sup> *Richmond*, at 481.

<sup>59</sup> The Small Business Act, 15 U.S.C. 631.

<sup>60</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The constitutional claim raised by Adarand was that the program at issue violated the due process clause of the 5<sup>th</sup> amendment. It is relevant in the course of this dissertation because the Court ruled that such a claim should be analyzed the same way a 14<sup>th</sup> Amendment claim would be.

<sup>61</sup> *Id.* at 239.

<sup>62</sup> *Id.* at 240.

<sup>63</sup> *Id.* at 241.

<sup>64</sup> *Id.* at 241.

<sup>65</sup> *Id.* at 243.

<sup>66</sup> *Hopwood v. State of Texas*, 78 F. 3d 932 (5<sup>th</sup> Cir. 1996).

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<sup>67</sup> It should be stressed again that predicting decisions of the Supreme Court is impossible to do and that this mere conjecture based on previous decisions and the known ideological slant of the Justices.

<sup>68</sup> *Hopwood*, at 945.

<sup>69</sup> *Johnson v. Board. of Regents*, 263 F.3d 1234 (11<sup>th</sup> Cir. 2001).

<sup>70</sup> *Id.* at 1254.

<sup>71</sup> *Wessman v. Gittens*, 160 F.3d 790 (1<sup>st</sup> Cir. 1998). The year in question, the total remaining applicant pool consisted of roughly 27% African-American, 40% white, 19% Asian, 11% Hispanic, and less than 1% Native American.

<sup>72</sup> *Tuttle v. Arlington County School Board*, 195 F.3d 707 (4<sup>th</sup> Cir. 1999).

<sup>73</sup> *Hunter v. Regents*, 190 F.3d. 1061 (9<sup>th</sup> Cir. 1999).

<sup>74</sup> *Eisenberg v. Montgomery County*, 197 F.3d. 123 (4<sup>th</sup> Cir. 1999). The *Eisenberg* decision prompted Carrollton-Farmers Branch, a suburban Dallas area district that is one of the subjects of our study, to discontinue a similar race-based transfer policy.

<sup>75</sup> *Brewer v. West Irondequoit Central School District*, 32 F. Supp. 619 (W.D.N.Y. 1999).

<sup>76</sup> *Brewer v. West Irondequoit Central School District*, 212 F.3d. 738 (2<sup>nd</sup> Cir. 2000).

<sup>77</sup> *Id.* at 745.

<sup>78</sup> *Id.* at 748.

<sup>79</sup> *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F. 2d 705 (2<sup>nd</sup> Cir. 1979).

<sup>80</sup> *Johnson*, at 1253.

<sup>81</sup> *Hopwood*, at 963, 965.

<sup>82</sup> *Hopwood*, at 951.

<sup>83</sup> *Wessman*, at 800.

<sup>84</sup> *Bakke* is still good law in all circuits but the Fifth.

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<sup>85</sup> *University of California Regents*, at 315.

<sup>86</sup> *Id.* at 316.

<sup>87</sup> *Id.* at 317.

<sup>88</sup> *Id.* at 318.

<sup>89</sup> It is perhaps worthwhile to note that not all of the members of the *Bakke* Court were able to draw such a distinction between the Davis and the Harvard program. Though he conceded that the Harvard program was perhaps better than the Davis program, Justice Blackmun, in his separate opinion, called the line between the two programs “thin and indistinct.” In the concurring opinion written by Justice Brennan and joined by Justices Blackmun, Marshall, and White, there is the suggestion that the difference between the two programs is only that Harvard keeps from the public the “extent of the preference and the precise workings of the system.”

<sup>90</sup> *United States v. Paradise*, 480 U.S. 149 (1987).

<sup>91</sup> *Tuttle v. Arlington County School Board*, 195 F.3d. 698 (4<sup>th</sup> Cir. 1999).

<sup>92</sup> *Id.* at 707.

<sup>93</sup> *Id.* at 707.

<sup>94</sup> *Johnson*, at 1255.

<sup>95</sup> *Id.* at 1255.

<sup>96</sup> *Id.* at 1256.

<sup>97</sup> The contention that children and siblings of alumni were overwhelmingly white was challenged in Circuit Judge Marcus’ opinion as not being supported by any statistical evidence.

<sup>98</sup> *Johnson*, at 1259.

<sup>99</sup> *Id.* at 1261.

<sup>100</sup> *Hopwood*, at 966.

<sup>101</sup> *Hunter*, at 1066.

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<sup>102</sup> *Id.* at 1077.

<sup>103</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>104</sup> *Ambach v. Norwick*, 441 U.S. 68 (1979).

<sup>105</sup> The exception to this, of course, would be elementary or secondary schools run in association with an institution of higher education (or some other research institution) such as the school run by U.C.L.A. at issue in *Hunter v. Regents*.

<sup>106</sup> *Sweezy v. New Hampshire*, 354 U.S. 234 and *Keyishian v. Board of Regents* 385 U.S. 589 (1967).

<sup>107</sup> *University of California Regents*, at 312.

<sup>108</sup> Justice Powell suggested in his opinion that the concept of student body diversity as a compelling state goal takes on “greater force” at the undergraduate level, but he makes no suggestion that he would extend the argument to the secondary or elementary level.

<sup>109</sup> *Amicus Curiae* brief from the United States Department of Justice, filed on behalf of the West Irondequoit Central School District upon appeal in *Brewer v. West Irondequoit Central School District*.

<sup>110</sup> *Missouri v. Jenkins*, 515 U.S. 70 (1995).

<sup>111</sup> *Hunter*, at 1064.

<sup>112</sup> *Id.* at 1067.

<sup>113</sup> *Wessman*, at 803.

<sup>114</sup> *Wessman*, at 805.

<sup>115</sup> *Id.* at 805.

<sup>116</sup> *Id.* at 806.

<sup>117</sup> *Id.* at 806.

<sup>118</sup> *Id.* at 807.

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<sup>119</sup> ARK. CODE ANN. § 6-23-106(a) (Michie, 2001).

<sup>120</sup> Per email correspondence with Randall Greenway, Sept. 11, 2001.

<sup>121</sup> VA.. CODE ANN. § 212.8(B)(6) (Michie, 1998).

<sup>122</sup> Center for Education Reform website reports the reason that charters have not caught on in Virginia is due to the fact that sole chartering authority is given to local districts with no avenue of appeal for those groups whose applications are denied.

<sup>123</sup> LA. REV. STAT. ANN. § 3991(C)(3) (West, 1995).

<sup>124</sup> *Id.* at (B)(3).

<sup>125</sup> OKLA. STAT. ANN. tit. 30 § 3-140(B) (West, 1999).

<sup>126</sup> CAL. EDUC. CODE § 47605(6)(5)(G) (West, 2001).

<sup>127</sup> FLA. STAT. ANN. § 228.056(10)(a)(8) (West, 2001).

<sup>128</sup> WIS. STAT. ANN. § 118.40(1m)(b)(9) (West, 2001).

<sup>129</sup> KAN. STAT. ANN. § 72-1906(d)(2) (1994).

<sup>130</sup> S.C. CODE ANN. § 59-40-50(B)(6) (Law Co-op, 1996).

<sup>131</sup> NEV. REV. STAT. ANN. § 386.580(1) (Michie, 1997).

<sup>132</sup> N.J. STAT. ANN. § 18(A)(8)(e) (West, 1996).

<sup>133</sup> N.C. GEN. STAT. § 115C(g)(5)(i) (1996).

<sup>134</sup> Center for Educational Reform Charter School website,

<http://www.edreform.com/charterschools/>.

<sup>135</sup> N.C. GEN. STAT. § 115C(g)(5)(i) (1996).

<sup>136</sup> North Carolina State Board of Education Policy on Charter Schools Racial and Ethnic Balance, Policy Number EEO-U-003, <http://sbepolicy.dpi.state.nc.us/policies/EEO-U-003.asp?pri=04&cat=U&pol=003&acr=EEO>.



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<sup>137</sup> Per email correspondence with Jim Sanders, September 4, 2001. Although he did not mention it specifically, the abandonment of the weighted lottery plan at Sanders school was likely the result of the Fourth Circuit case *Tuttle v. Arlington County School Board*, which was decided on September 24<sup>th</sup>, 1999.

<sup>138</sup> Per email correspondence with Jim Sanders, September 4, 2001.

<sup>139</sup> “Segregation Anxiety,” Elizabeth Gleick, *Time Magazine*, Volume 145, No. 17, April 24, 1995.

<sup>140</sup> Connecticut Constitution Article First, Section 1 states that “All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.” Article First, Section 20 states that “No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin.” Article Eighth, Section 1 states that “There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.”

<sup>141</sup> American Civil Liberties Union Press Release, “Decision in *Sheff v. O’Neill*: Connecticut Supreme Court Announces that Racial and Ethnic Segregation in Hartford Area Schools Violates State Constitution,” July 9, 1996. <http://www.aclu.org/news/n070996a.html>.

<sup>142</sup> *Sheff v. O’Neill*, 678 A.2d 1267, 1285 (Conn., 1996).

<sup>143</sup> *Id.* at 1274.

<sup>144</sup> 1997 Conn. Acts 290, § 7(d)(8)(C) and § 7(d)(13).

<sup>145</sup> Olson, Walter, “A Connecticut Yankee in Court” *City Journal*, Autumn 1996, <http://walterolson.com/articles/cityjsheff.html>.

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<sup>146</sup> Texas Education Agency. (1997). *Texas Open Enrollment Charter Schools: Year One Evaluation*. Austin, TX: Author.

<sup>147</sup> Black, Les and Eric Juenke, “Do Choosy Moms Choose Diversity?” unpublished, University of North Texas, (2000).

<sup>148</sup> United States Department of Education, Office of Educational Research and Improvement. *A Study of Charter Schools: First Year Report 1997*. RPP International and the University of Minnesota, 1997.

<sup>149</sup> “Ethnic Segregation in Arizona Charter Schools,” Cobb, Casey; Glass, Gene. *Education Policy Analysis Archives*, v7 n1 1999. <http://epaa.asu.edu/epaa>

<sup>150</sup> Greene, Jay P. “Choosing Integration.” (paper presented at the School Choice and Racial Diversity Conference, Teachers College, Columbia University, New York, May 7, 2000).

<sup>151</sup> 42 U.S.C. 2000d states that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

<sup>152</sup> COLO. REV. STAT. ANN. § 22-30.5-101 (West, 2001).

<sup>153</sup> *Villanueva v. Carerre*, 85 F.3d. 481 (10<sup>th</sup> Cir. 1996).

<sup>154</sup> See 20 U.S.C. 2701-2976.

<sup>155</sup> *Villanueva*, at 486.

<sup>156</sup> *Id.* at 487.

<sup>157</sup> COLO. REV. STAT. ANN. § 22-30.5-103(1)(a) (West, 2001).

<sup>158</sup> *Villanueva*, at 488.

<sup>159</sup> Diversity statement in sample policy is based on Justice Powell’s description of diversity in *Bakke*.

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<sup>160</sup> The PSAS recruitment procedures are described in *Villeneuve v. Carerre*, the Eleventh Circuit decision discussed in Chapter IV of this dissertation.

<sup>161</sup> *Johnson*, at 1259.

<sup>162</sup> *Hopwood*, at 946.

<sup>163</sup> *Tuttle*, at 708.

<sup>164</sup> This policy would require individual review of each applicant and might need to be modified to administer in a large charter school with 1000 or more students. However, the individual consideration of prospective students is a key component of any admissions policy designed to foster diversity, whether it considers race or not.